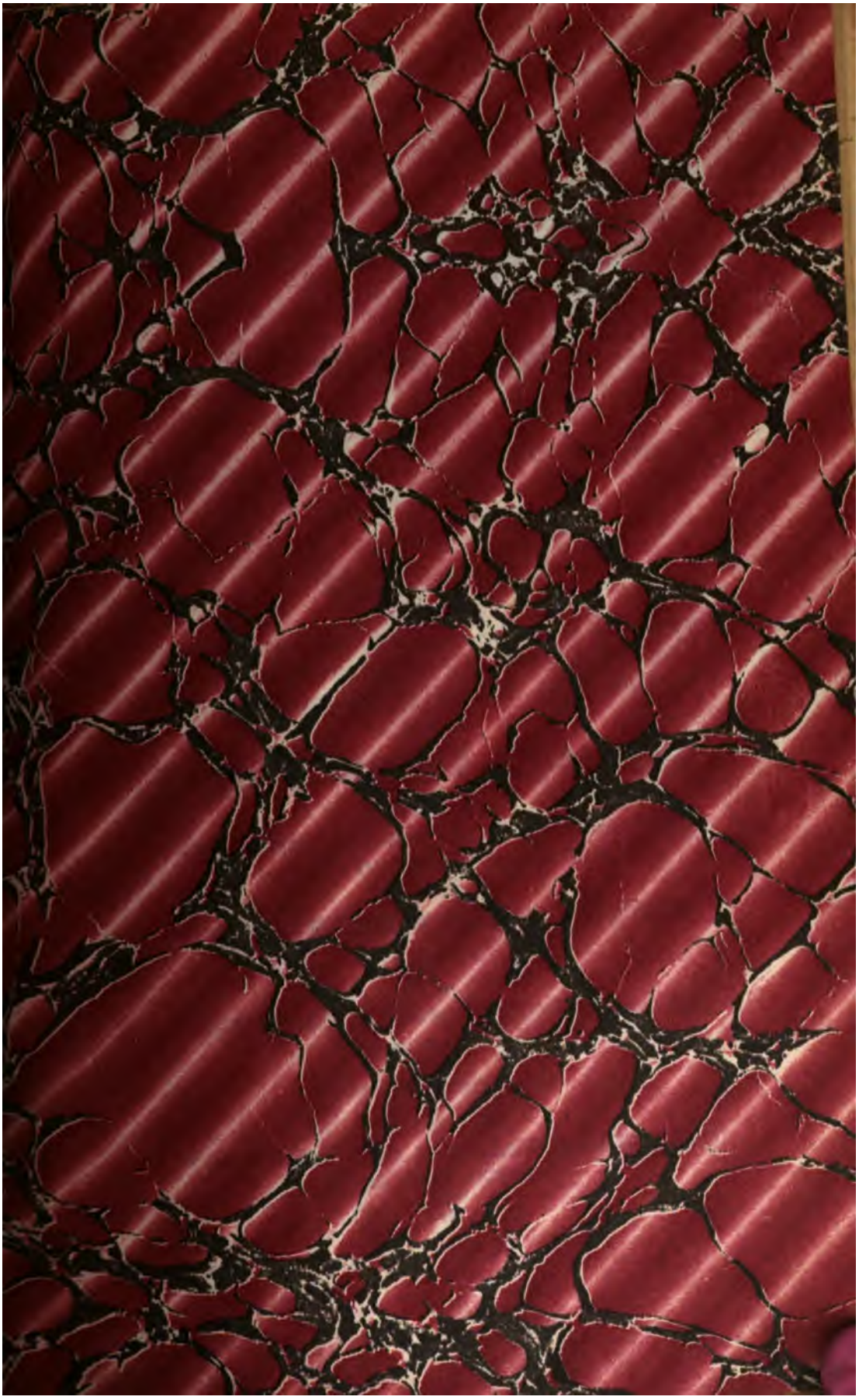

A

TREATISE

ON THE

LAW OF EVIDENCE

IN THE

Courts of Equity.

BY THE LATE

RICHARD NEWCOMBE GRESLEY, Esq., M.A.,

BARRISTER-AT-LAW.

SECOND EDITION,

WITH SUCH

ALTERATIONS AND ADDITIONS AS TO RENDER IT CONFORMABLE TO THE STATUTES, DECISIONS AND GENERAL ORDERS, REGULATING THE LAW AND PRACTICE, AS TO EVIDENCE,

IN THE

High Court of Chancery;

TOGETHER WITH

DIVERS FURTHER ILLUSTRATIONS, BY REFERENCE TO THE LAW AND PRACTICE, AS TO EVIDENCE,

IN THE

Courts of Common Law and Civil Law.

BY

CHRISTOPHER ALDERSON CALVERT, Esq., M.A.,

BARRISTER-AT-LAW.

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DEDICATION

OF THE FIRST EDITION.

TO THE RIGHT HONOURABLE

JOHN, EARL OF ELDON,

&c. &c. &c.

WHO, BY PERSEVERING INDUSTRY, TALENTS, AND INTEGRITY,
RAISED HIMSELF TO A STATION IN WHICH,
WHETHER ADMINISTERING THE LAWS OF ENGLAND,
OR PRESIDING OVER THE PEERAGE OF GREAT BRITAIN,
HE WAS EQUALLY REVERED,

THIS WORK

IS INSCRIBED

IN GRATITUDE FOR THE DIGNITY CONFERRED THROUGH HIM
ON THEIR COMMON PROFESSION,

BY THE AUTHOR.

PREFACE

TO THE FIRST EDITION.

THE want which has been long felt at the Chancery Bar of a work on Evidence illustrating the Practice in Equity, will be a sufficient apology for this attempt to remedy the inconvenience. The existing Treatises have been written by Barristers practising in the Courts of Common Law, and although points of Equity are sometimes incidentally discussed, yet an intimate knowledge of that subject is wanting, and thence, of necessity, the discussions are far from satisfactory. And, although the Reports in Equity abound with cases relating to the rules of evidence, yet those cases are rarely cited either to qualify, or to impugn, or to corroborate, the decisions of a Judge at Common Law. While, therefore, the lucid dissertations of Mr. Phillipps demand our praise, and the laborious compilation and philosophic views of Mr. Starkie compel our admiration, they still leave the field open for a practical treatise referring all its rules to the administration of Equity.

In examining the Cases to which his subject has led him, the Author has been often surprised at the neglect, and even the tone of disparagement, used towards the decisions of those great Judges whose slightest words he had habitually received with respect and deference. He has long felt convinced that a convenient arrangement of the opinions which they pronounced, and a plain exposition of the ability with which Lord Hardwicke, Lord Thurlow, or Lord Eldon, adapted the Rules of Law to the exigences of a Suit in Equity, would soon accustom Equity Barristers to bear in mind that they have a system of evidence of their own, and to refer to those great names, rather than look abroad for the rules of the Common Law Courts.

If the Author has failed in this attempt at a lucid arrangement of the Decisions in Equity, he might entrench himself behind a position which learned writers and judges have frequently maintained, and which is thus expressed by Mr. Fonblanque; "The nature of the subject scarcely allows of its being resolved into system; we may collect and generalize the ideas which are to be found upon it; we may give them a degree of precision by rule, but cannot give to them that comprehension which is necessary to system; and indeed when we reflect that the evidence to be allowed by law should be suited to the habits, opinions, and the state of society, we cannot but expect its rules to vary with the varying exigences of the subjects to which it is to accommodate itself. Thus we find that as occasions have arisen in which the rigid application of the rule would have caused a failure of justice, the rule has given way to the occasion."(*a*) But the instances of the application of this doctrine have been of late years comparatively rare, and there is little inclination now to add to their number; indeed the Author is well satisfied that at the present time the principles of the law of evidence are too firmly based, and its parts are too systematically connected, to be tampered with or to fluctuate materially.

One other observation may be made. It will very probably be thought, by some readers, that this Work contains too great a quantity of quotations. But the slightest investigation will show that the bulk of almost every Law Treatise consists of compilation; and the Author has thought it both more useful and more fair to suffer every thing borrowed by him to bear its own date and superscription, than to re-cast what belongs to others, and to issue it again with the uniform stamp of his own unestablished authority.

(*a*) 1 Fonbl. on Equity, 449.

TO

SIR EDWARD HALL ALDERSON,

&c. &c. &c.

ONE OF THE BARONS OF

HER MAJESTY'S COURT OF EXCHEQUER,

WHO

SO LONG AS THE JURISDICTION EXTENDED TO

CAUSES IN EQUITY AS WELL AS TO ACTIONS AT LAW,

WAS

IN THE CONSTANT HABIT OF

ADMINISTERING JUSTICE IN THAT COURT

IN EQUITY AS WELL AS AT LAW,

THIS EDITION OF A WORK

ON

EVIDENCE,

IN

COURTS OF EQUITY,

IS,

WITH HIS PERMISSION,

GRATEFULLY AND RESPECTFULLY INSCRIBED

BY

HIS OBLIGED AND OBEDIENT SERVANT,

THE EDITOR.

PREFACE

TO THIS EDITION.

TEN years have passed since the publication of this Work, during which time the Profession have given the best proof of their approbation of it, by its very general use; whilst no better compilation of the kind has appeared, to supersede the necessity for a new Edition; a necessity which has come to be urgent, as well as great, since the passing of divers Statutes affecting or relating to the Law of Evidence, the abolition of the Equity side of the Court of Exchequer, the addition to the number of the Judges in the High Court of Chancery, the almost overwhelming accumulation of more or less binding and illustrating Decisions of the Courts of Equity and those of Law, besides the continual and important alterations of the Practice of the Court of Chancery, as a Court of Equity, by the many Orders which have been issued, from time to time, by authority of that Court, and the not less numerous Cases in which the Law and Practice, as to Evidence, have come to be discussed with ability, applied with ingenuity, and the general principles involved in each Case developed, explained and decided, with such degree of certainty, at least, as the mode of reasoning from the particular to the general, in matters of this kind, will properly admit of.

By the premature decease of Mr. Gresley the Author of this Work, who had been the first methodical cultivator of this wide field of learning, the whole was again left (as he himself had described it) an open field;

one inviting and worthy of talent as well as industry: and though since then, here and there, a part of it may have been sedulously and not altogether unsuccessfully occupied and cultivated, by the authors of the approved Treatises upon the Practice of the Court of Chancery, where they had a necessity for adverting to this part of their subject; and a more considerable portion may have been rendered productive by Mr. Tamlyn, in his Treatise on the subject, (published after the preparation for the publication of the present Work,) and a wide tract of the field has been successfully enclosed, and cultivated by Mr. Hubback, in his Treatise on the Evidence of Succession to Real and Personal Property and Peerages; still no one seems to have been bold enough to undertake to treat the whole in that manner which it seems to deserve: and under these circumstances, not without some diffidence as to the possession of fitting talents, but with great reliance upon the efficacy of continuous and laborious exertion to supply other defects, the Editor of this Edition has taken upon himself to break up and prepare the soil, here and there, even where it had been untouched, and after a little cautious weeding of that part heretofore occupied and cultivated by Mr. Gresley, to plant in every part of it.

Relinquishing the use of language of figure, as not very suitable to the subject of this Preface, the Editor deems it incumbent upon him to give some slight general account of his own labours, and so to define the limit of his own responsibility.

In preparing this Edition of Mr. Gresley's Work for the press, such alterations, as well as additions, have been freely made, by the Editor, as seemed necessary, or even, as to additions, advisable. In the consideration of each of these, the principal object has been to render

this Work not only as complete of its kind as the solid materials at hand would make it, but also still more practically useful than it hitherto may have been; especially to junior members of the Legal Profession, who may desire to find what they want to know, without, at the moment, knowing, or at least recollecting, exactly, where they ought to expect to find it. Such authority as may exist, supporting the rule or practice applicable to the case before them, will now, it is confidently hoped, be easily found. This the principal object in view in the Editor's plan, must have tended to make the present Edition one not the less practically useful to those experienced persons who, on the Bench or at the Bar, having brought under their immediate view, (in those parts of the text or notes of this Work, to which their attention is pointed by the Index,) the very words of an Act of Parliament, or Order of Court, and the short citation of, or (in some cases) mere reference to, all the Reported Cases, which by a diligent and careful search could be found, will be themselves far better qualified and able than the Editor could possibly be, to deduce therefrom, the general principle, and the particular part of it, which should apply to the question before them; whilst to have enunciated every doctrine deducible from every authority, would have been almost endless and useless, even had it been undertaken.

The Editor has not often ventured to express his own opinions as to the effect of a Statute, Order or Case, further than by the careful allocation of each citation, in that part of the Work to which, after deliberation, he deemed it most strictly relevant; but a reference to the multiplicity of such citations, of authoritative weight, will serve, to exculpate him fully from every suspicion of having shrunk from the mere labour, which his younger

brethren in the Profession may wish he had bestowed, and will go very far to account to such, for this limitation of his duty, within the bounds of his unpretending ability.

The several very important Statutes, which (as passed within these few years last past,) are adverted to above, more particularly those most directly relating to Evidence, and the Admission of Testimony and Documents as such, have been, not slightly and in passing only but, plainly, distinctly, and, where any necessity arose, repeatedly noticed, both in the text and notes of this Edition, according to their apparent importance and relevance; and, in general, the very words of the Enactment have been quoted at length.

Every General Order of the High Court of Chancery in England, at all relevant to the subject of this Work, (by the use of, amongst other works, the very interesting and most useful collection of the Orders, by Mr. Sanders,) has been fully considered, and taken due notice of; and all such as might at all usefully illustrate, as well as all such as could be necessary to perfect this Work, have been sufficiently introduced into this Edition, in their proper places, and also, with unsparing hand, by means of notes, repeatedly referred to, in those other parts of the Work, which they might either affect or illustrate.

Not only has every Decision at all relating to the Law or Practice as to Evidence, which has appeared in the Reports of Decisions in the Courts of Equity, from the date of the publication of this Work to the completion for the press of this Edition, been carefully sought for and considered, and all of them which appeared to be of any substantial importance cited, or at least referred to, in the Notes to this Edition; but, although neither undertaken by, nor, he ventures to assert, reasonably to have been expected of the Editor, he has

most carefully gone over and gleaned the whole field of Reported Cases of still earlier, and indeed from the most early times, availing himself, not without gratitude, of the use of the latter edition of the Index of such, by Mr. Chitty, and of similar useful though unpretending compilations; some of which he now, by experience, knows to be more than mere monuments of laborious but limited talent.

The Editor, having used this diligence, assures himself he has good ground to assume, and accordingly ventures confidently to express his belief, that this Edition of Mr. Gresley's Work will afford, indirectly, by reference at least, if not by express mention and fuller citation, some sufficient indication of every Reported Case, of any importance, peculiarly applicable to the subject of Evidence, as used in Courts of Equity.

Besides all this, knowing, from experience, as well as an apprehension of the nature of the subject, how defective, after all, a Work of this kind would be, which should comprise the Decisions of the Courts of Equity only, upon matters wherein such Courts desire to know and follow the Practice of those of Law, the Editor has aimed at enriching, and he believes succeeded in enlivening this Edition, and rendering it still more acceptable and calculated to be useful to the Profession in general, and to all who may have occasion to consult it, by the citation of very many, and a reference to still more, of the Decisions at Common Law, which have been reported since those cited by Mr. Gresley; more particularly (where to cull was absolutely necessary) such of them as seemed more immediately relevant to the matters ordinarily discussed in the Court of Chancery, as a Court of Equity. Amongst these Decisions not a few, and not the least important, have been reported even

since the compilation of the latest Editions of those standard and approved Treatises on Evidence, particularly mentioned and so deservedly eulogised by Mr. Gresley, in his Preface to this Work.

Further with a view to illustrate this Edition, availing himself of the Index, by Dr. Maddy, of the Reported Decisions in the Ecclesiastical Courts, and of some collections towards the forthcoming Index to the Reported Decisions in the Court of Admiralty, &c., (with which he has been favoured by Mr. Pritchard of Doctors' Commons, who is now preparing such Index for the press,) the Editor has cited a few of the *dicta* and decisions of the learned Judges in the (so called) Civil Law Courts, on the subject of Evidence; as to which, it would seem that these Courts, whether Christian or Maritime, affect to maintain, equally with the Courts of Equity, a general correspondence in the principles of adjudication and practice, with the Courts of Common Law, so far forth at least, as the nature of the proceedings, and of the matters investigated in such Courts, will admit of it.

The Editor cannot be expected to have been of the same opinion as the Author, upon every point collaterally noticed; but, excepting here and there, (as *e. g.* at page 16, note (*e*),) he has not seen any necessity to obtrude upon the reader his own views, as to such matters. He has not had occasion to omit any passages of Mr. Gresley's Work which seem to call for observation in this place; but has availed himself of the opportunity of slightly altering a word or two, or even more, which he supposes the Author, at a later period, had he been spared, would himself have altered or expunged; using even this liberty but very sparingly, generally so as to be distinctly visible, and never so as to attribute to the Author that for which the Editor should be responsible.

The Editor having, at the outset of his labours, declined to take upon himself to prepare a new treatise on this subject, such as might have superseded the necessity for a new Edition of this one, determined, after considerable deliberation, to omit very little of the matter which Mr. Gresley had inserted in his Work, but to add all that might seem requisite; thus facilitating, in no small degree, the task which hereafter he himself, or (for he has no present intention on the subject) some person still better qualified, may possibly see fit to take in hand.

In using this Edition, the reader will please to observe, that every word of the additions by the Editor, whether in text or notes, is clearly distinguished from the original, by being included within brackets, thus [ ]; as *e. g.* at page 1, note (*a*) and part of note (*b*).

The old paging has been preserved, in the margin of this Edition, to facilitate reference from works in which the original text or notes may have been cited or referred to; and thus, as it happens, the aggregate augmentation, in quantity of matter, of this Edition is rendered somewhat conspicuous; even although, by the use of smaller type in the notes, and compression in the text also, every effort has been made to keep it within as small a compass as conveniently might be, and the necessity for the inconvenience of a second volume has been by such means avoided.

To facilitate the habitual use of this Work as a work of reference also, not only the page, but even the precise part of it, in which each case is cited, or referred to, in this Edition, will be found indicated, in the List of Cases, which follows; and with a further view to preclude that consuming waste of time, on each occasion of consulting such a compilation, of which daily experience shews the effect, a like precaution has been taken, although not

without further and additional care and labour, in the preparation of the Index to this Edition; which, whilst it comprises all that was in the Index to the Original Edition, has been made much more full, and unusually, but, it is hoped, not unusefully, extensive.

The numerous Cases cited or referred to in this Edition for the first time, and the additional citations of those noticed by Mr. Gresley, are distinguished, in the List, as new matter; and here again one glance will suffice to shew, that such additional citations and references are very numerous, and in some slight degree, to evince the time and pains bestowed on this Edition.

The Editor has had no assistance for which he might express gratitude, excepting that to which he has alluded above; and if the generally received opinion be universally true, and the fact be, as such opinion assumes, that brilliant talent is not to be found associated with a capability for continuous drudgery, (as some would call the laborious exertion, which the Editor avows he has found to be indispensable,) he may at least be excused for observing, by way of conclusion, that it may hereafter be well for that person whose talents and learning may render him capable of properly appreciating, fairly criticising, improving upon, and, by the production of a better, superseding this Work, that he will here find ready to his hand, stores of materials, solid, select and yet abundant, whereupon to exercise his superior abilities; whilst it will be well for the Profession, and indeed for all interested in the facilitation of the administration of justice in the Courts of Equity, that such an one need not henceforward be deterred from so doing, by the mere irksomeness of the time-consuming task of collecting and arranging such materials.

Serle Street, Lincoln's Inn Fields,
Jan. 1st, 1847.

TABLE OF CONTENTS.

INTRODUCTORY CHAPTER, p. 1.

The rule Æquitas sequitur legem *considered.* p. 3.
Number of Witnesses. p. 4.
Arbitrary rules fixed differently, &c. p. 5.

PART THE FIRST.

THE MEANS BY WHICH THE PARTIES PREPARE THEIR EVIDENCE.

CHAPTER I.—Admissions in the Pleadings. p. 9.

Advantages of this kind of Evidence. p. 13.
Fictions in the bill. p. 16.
Amendments of Admissions. p. 18.
Taking exceptions. p. 19.
Amending the bill. p. 25.
Supplemental bill. p. 28.
Motion to produce documents. p. 30.

CHAPTER II.—Admissions made, by agreement, and Waivers of Proof. p. 47.

CHAPTER III.—Evidence produced by Witnesses. p. 52.

SECT. 1.—*Interrogatories.* p. 54.

SECT. 2.—*The Examiners of the Court.* p. 52.

Demurrer to Interrogatories. p. 77.

SECT. 3.—*Commission to examine Witnesses.*

in England. p. 88.

[*Old Practice.* p. 89, et seq.

New, p. 94, et seq.]

abroad. p. 112.

de bene esse. p. 121.

[*Commissions executed in Scotland or Ireland, by statute* 6 & 7 *Vict. c.* 82. p. 126*.]

[*New commissions or additional commissions.* p. 127.]

[—*Examination of Witnesses* in perpetuam rei memoriam. p. 129.]

SECT. 4.—*Publication.* p. 136.

[—*The Cause set down for hearing.* p. 145.]

SECT. 5.—*Exhibits.* p. 146.

Records. p. 147.

Public documents, not Records. p. 166.

Private documents. p. 172.

SECT. 6.—*Proof of Exhibits,* vivâ voce, [*or by affiduvit.*] p. 188.

CHAPTER IV.—Evidence Allowed on Special Order. p. 194.

Examination to impeach the credit of Witnesses. p. 204.

of a defendant. p. 209.

[*of a defendant after a third insufficient answer.* p. 210.]

PART THE SECOND.

THE RULES BY WHICH THE COURT EXCLUDES EVIDENCE.

[*Evidence not read or put in.* p. 212.]

CHAPTER I.—Suppression of Depositions. p. 213.

[*Examination by the solicitors, time for this.* p. 213.]

SECT. 1.—[*Scandal or Impertinence, process to expunge.* p. 215.]
Reference for scandal. p. 214.
impertinence. p. 218.
SECT. 2.—[*Irregularity.* p. 219.]
[*Process to suppress.* p. 224.]
[*Objections, (on these grounds,) at hearing of the cause.* p. 225.]

CHAPTER II.—Objections at the Hearing,
On grounds peculiar to Courts of Equity. p. 226.

CHAPTER III.—Ojections at the hearing,
On grounds common to Equity and Common Law. p. 229.
SECT. 1.—*Evidence impertinent.* Ib.
Matters not in the Pleadings. p. 230.
Matters admitted in the Pleadings. p. 236.
[*Matters admitted by agreement.* p. 238.]
Matters not material. Ib.
[*Hearing on bill and answer,* p. 239.]
[*General Rule in Equity, as well as at Law.*]
[*Substance to be proved.* p. 239.]
Inquiries referred to the Master. p. 240.]
[*An Account not taken at the hearing.* Ib.]
[*Object of the Evidence before the hearing.* Ib.]
[*Unessential matters not to be proved.* p. 241.]
Variance. p. 242.
[*Agreements to be proved as stated.* p. 243.]
Needless prolixity and superfluity. p. 245.
SECT. 2.—*Evidence Secondary.* p. 247.
When the best Evidence would be oral. p. 248.
[*Witness not now examinable.* p. 249.]
[*Public Officers' certificates.* p. 253.]
Depositions de bene esse. p. 256.
in a former suit. p. 258.
Handwriting, [*and inferences therefrom,*] p. 263.
When the best evidence would be documentary. p. 268
Document not now producible. p. 268.

withheld by a party, or a witness. p. 268.
destroyed or lost. p. 268-9.
[*in the possession of the other party.* p. 273.]
[*or destroyed by him.* p. 275.]
[*not produced by a witness.* p. 275.]
[*when an affidavit by plaintiff is necessary. to be filed with the bill.* p. 275.]
Document originally defective. p. 276.
[*When extrinsic evidence is admissible, and when not.* Ib.]
[*Omissions.* p. 277.]
[*Defects not amounting to omissions.* p. 278.]
[*Ambiguities and Difficulties.* p. 279.]
[*Evidence to explain.* p. 287.]
[*As to consideration and date of a deed, &c.* p. 287-8.]
[*Where the Court allows variation of and addition to agreements in writing or deeds, and on what grounds.* p. 289.]
[*Cases of trust.* p. 292.]
Parol evidence to rebut presumptions. p. 294.
as to accumulation of legacies. Ib.
as to ademption of legacies. p. 297.
as to cancellation of a will [*prior to the late statute*] p. 300.
SECT. 3.—*Hearsay.*
[*What the term includes.* p. 304.]
Reputation. p. 305.
Statements, [*oral or written,*] *against interest, &c.* p. 308.
In questions of pedigree. p. 316.
as to such made post litem motam. p. 321.

[*As to incompetency to give evidence in suits, &c., commenced since the 22nd of Aug.* 1843. p. 325.]
[*Act for improving the Law of Evidence, statute* 6 & 7 *Vict. c.* 85. p. 326-7.]
SECT. 4.—*Witness incompetent* [*as to Suits, &c., commenced prior to the 22nd of Aug.* 1843.] p. 328.

General Incompetency. p. 331.
Incompetency in the particular suit. p. 336.
Party to the suit;[*—when interested.*] p. 337.
Husband or wife of [*such*] *a party.* p. 341.
Persons pecuniarily interested in decree, &c. p. 345.
Exceptions. p. 364.
Restoration of competency. p. 368.
Incompetency as to particular evidence. p. 375.
[*Persons privileged, or precluded, from testifying,* p. 377.]
Professional privilege. p. 379.
[*Other confidential communications.* p. 381.]
[*Parents not to testify, to bastardize their issue born after marriage, &c.* p. 384.]
[*Party, or witness to a deed, &c., to invalidate it.*] p. 385.
SECT. 5.—*Other objections.* p. 387.
[*Cross-examination—where examination has not been made use of.* Ib.]
Proving a negative. Ib.
[*in pedigree cases.* p. 389.]
Documents not properly stamped. p. 391.

PART THE THIRD.

THE EVIDENCE USED BY THE COURT AT THE HEARING. p. 393.

CHAPTER I.—Where the Court takes Judicial Cognizance.
SECT. 1.—Suo motu. p. 395.
Previous knowledge, [*of the Judge*]. p. 395-6.
[*Documents of reference.* p. 396.]
Histories, &c. p. 397.
[*Matters of Law and Practice.* p. 401.]
[*Acts of Parliament.* Ib.]
[*Precedents.* Ib.]
[*Decisions of similar cases.* Ib.]

[*Certificates as to practice.* p. 401.]
Precedents. p. 402.
[*Reports of cases decided,* p. 402.]
[*Text Books,* p. 403.]
Public Acts of Parliament. p. 404.

SECT. 2.—*Not* suo motu.

Local and personal Acts, declared Public. p. 408.
Records, p. 408-9.
[*Copies of Records.* p. 410.]
Exemplifications. Ib.
[*Signature of a Judge.* p. 413.]
[*Probate copy of a Will, &c.* p. 414.]
Letters Patent, Effect in Evidence of such. p. 415.
Deeds enrolled, [*not therefore records.*] p. 416.
[*unless by Act of Parliament.* p. 417.]
[*Registers of deeds of conveyance.* p. 419.]
[*Ships registers.* Ib.]
[*Force of a Record.* p. 420.]

SECT. 3.—*Effect of judicial documents.*

Documents belonging to Equity Suits. p. 421.
to Actions at Common Law. p. 430.
[*to proceedings in Bankruptcy.* p. 436.]
[*to proceedings in Lunacy.* p. 438.]
[*Certificates.* Ib.]
to Ecclesiastical and other Suits. p. 439.
[*Foreign Law, how proved.* p. 447.]

CHAPTER II.—Where the Court resorts to Inspection in aid of proof.

Trial by inspection. p. 449.
[*Inspection in Equity Suits.* p. 450.]
Examination of documents. p. 451.
Copyrights and Patents. p. 454-5.

CHAPTER III.—Effect of the Admissions, and of the Examinations.

Direct admissions. p. 456.
Constructive admissions. p. 466.
Credit due to witnesses. p. 469.
[*The Court alone to weigh the credibility.* p. 472.]

CHAPTER IV.—Inferences which the Court will draw, and Presumptions.

Inferences. p. 473.
[*Presumptions.* Ib.]
Presumptions anterior to evidence. p. 474.
[juris et de jure. p. 475.]
[*Presumptions of Law* (juris sed non de jure). p. 477.
[*Presumptions of Fact.* p. 483.]

CHAPTER V.—Where the Court requires further Information.

[*Means adopted.* p. 489.]
[*Preliminary accounts and inquiries.* Ib.
[*Inquiries.* p. 490.]
SECT. 1.—*Examination by the Court* vivâ voce. 493.
SECT. 2.—*Reference to a Master.* p. 501.
Examination pro interesse suo. p. 519.
SECT. 3.—*Issue of Fact.* p. 523.
SECT. 4.—*Issue of Law.* p. 530.

CHAPTER VI.—Evidence on Appeals and Rehearings, p. 533.

CHAPTER VII.—Affidavits, p. 538.

APPENDIX.

Forms of Interrogatories. p. 547.

TABLE OF CASES

IN

THIS EDITION.

NOTE.—*The number indicates the page, and the letter the part of it, or the note, in which the Case is cited or referred to.*

Abignye v. Clifton .. 254 *g*
Abrams v. Winshup 182 *a*, 199 *d*
Adam v. Kerr . 249 *d*, 252 *d*
Adams v. Bohun .. 116 *d*
——— v. Lingard .. 385 *c*
——— v. Fisher .. [19 *a*]
——— v. Malkin .. 353 *c*
Adamthwaite v. Synge .. 160 *a*
Abbot v. Plumbe .. 175 *c*
Abergavenny, Lord, v. Powell 106 *a*
Addis v. Campbell .. [38 *d*]
Addison v. Walker .. 45 *g*
Agar v. Regent's Canal Co. 20 *c*
Aitken, *Ex parte* .. [380 *e*]
Aked v. Aked .. [152 *c*]
Akers v. Chancy .. [114 *g*]
Alam v. Jourdan .. 4 *b*
Alban v. Pritchett .. 343 *b*
Aldridge v. Wallscourt, Lord 350 *b*, 353 *a*
Alexander v. Clayton . 386 *a*
——— v. Crosbie [289 *f* and *g*]
——— v. Totter [340 *b*, 357 *e*]
Allen v. Denstone [310 *b*, 464 *c*, 465 *d*]
——— v. Pendlebury .. 506 *a*
Alsop v. Bowtrall .. 439 *c*
Alves v. Bunbury .. 155 *a*
Ambrosio v. Francia . 209 *b*
Amitié Villeneuve, case of 350 *f*
Anderson v. Hamilton 86 *g*, 377 *b*
——— v. Pitcher .. 280 *e*
Andrew v. Andrew . 521 *d*
Andrews v. Beauchamp, Lady 341 *c*, 367 *c*
Andrews v. Beauchamp, Lady [526 *e*]
——— v. Dobson .. [286 *b*]
——— v. Emmett . [294 *b*]
——— v. Palmer 143 *c*, 250 *d*, 256 *d*
——— v. Powys . [444 *a*]
Angell v. Angell [112 *d*, 112 *f*, 130 *e*, 131 *b*, *c*, *e*, and *f*, 135 *b*]
——— v. Angell .. 124 *d*
Angel v. Haddon . 29 *b*
Annandale, *Ex parte* .. [187 *c*]
Annesley v. Anglesey, Earl of 322 *a*, 541 *g*
Anon., Ambl. 252 . 220 *h*
—— 1 Anstr. . 114 *f*
—— 1 Atk. 40. 42 . [65 *f*]
—— 2 Atk. 15 . [371 *c*]
—— 2 Atk. 270 .. 227 *b*
—— 3 Atk. 17 . 539 *d*
—— 3 Atk. 219 .. [5 *b*]
—— 3 Atk. 511 .. [521 *a*]
—— 3 Atk. 524 . 504 *c*
—— 3 Atk. 633 .. 118 *e*
—— 2 B. & Ad. 285 .. 429 *b*
—— 5 Beav. 92 .. [137 *f*]
—— Brownlow, 47 . 343 *c*
—— Bull. N. P. 289 .. [368 *a*]
—— Bull. N. P. 290 .. 368 *c*
—— 2 Camp. 390 .. 272 *a*
—— Carey, 37 . [203 *e*]
—— Carey, 53 .. [108 *c*]

Page

Anon., Carey, 80 .. [203 *e*]
—— 1 Ch. Ca. 155 .. [199 *l*]
—— 2 Ch. Ca. 39 .. 345 *c*
—— 2 Ch. Ca. 79 .. [221 *d*]
—— 2 Ch. Ca. 214 .. [338 *b*]
—— Dick. 778 .. 44 *a*
—— Doug. 593 . 167 *a*
—— 2 Eq. Ab. 397 .. [371 *c*]
—— 2 Freem. 134 .. [76 *b*]
—— 2 Freem. 136; 2 Eq. Ca. Abr. 8 . 364 *b*
—— Gilb. Eq. Rep. 183 [271 *c*]
—— Gilb. on Ev. 52 .. 7 *b*
—— Godbolt, 326 .. 252 *b*
—— 4 Mad. 252 .. [214 *c*]
—— 4 Mad. 463 .. [67 *a*]
—— 6 Mad. 58 .. 527 *g*
—— 6 Mad. 97 .. 30 *b*, 38 *c*
—— 3 Mod. 116 .. 259 *a*
—— 9 Mod. 66 .. 154 *d*
—— 9 Mod. 66 .. [447 *d*]
—— 9 Mod. 67 .. 154 *d*
—— 10 Mod. 439 .. [158 *b*]
—— 12 Mod. 345 .. 385 *b*
—— Mose. 118 .. [208 *f*]
—— 1 Mose. 191 .. [522 *a*]
—— 1 P. Wms. 100 29 *e*, 457 *d*
—— 1 P. Wms. 300 [29 *b*, 340 *f*]
—— 2 P. Wms. 405 .. 218 *c*
—— 2 P. Wms. 406 .. [76 *d*]
—— Prac. Alm. Cur. Canc. 19, [108 *c*]
—— Prac. Reg. 126 .. [108 *c*]
—— Salk. 289 .. 368 *b*
—— 5 Sim. 497 .. 402 *a*
—— Skin. 4 .. 390 *d*
—— 1 Toth. 189 .. [106 *c*]
—— 1 Vern. 187 .. 211 *a*
—— 1 Vern. 253 .. 141 *a*
—— 1 Vern. 263 .. [65 *f*]
—— 1 Vern. 283 .. 365 *a*
—— 1 Vern. 334 .. [127 *a*]
—— 2 Vern. 197 .. 220 *c*
—— 2 Ves. 578 .. [171 *c*]
—— 5 Ves. 656 .. [218 *h*]
—— 6 Ves. 288 .. [121 *f*, 519 *c*]
—— 8 Ves. 69 .. [112 *a*]
—— 14 Ves. 213 .. 38 *b*
—— 18 Ves. 517 .. [338 *g*]
—— 19 Ves. 321 .. 122 *g*
—— 1 Ves., jun. 152 .. [526 *f*]
—— 3 V. & B. 93 208 *c*, 544 *d*
—— 12 Vin. Abr. 37 . 379 *c*
—— 12 Vin. Abr. 38 .. 378 *c*
—— 12 Vin. Abr. Ev., T. *b* 91, [320 *d*]
—— Willis, 543 .. [65 *f*]

Page

Anon., Stark. Ev. 1034 .. 267 *b*
—— Str. 527 .. 345 *a*
Antram v. Chase .. 426 *e*
Antrobus v. East India Co. 524 *c*
Appleton v. Braybrook, Lord, 155 *c* and *e*
Armiter v. Swanton .. 339 *a*
Armiter v. Swantin [339 *d*, 340 *a*]
Armstrong v. Hewitt [186 *f*, 313 *c*]
Arnot v. Briscoe .. 4 *d*
Armsby, *Ex parte* [259 *e*, 263 *c*, 354 *e*, 387 *c*]
Arthur v. Arthur [272 *b*, 414 *g*]
Arundel v. Arundel [223 *c*, 257 *a*, 258 *a*]
Arundle, Lord, v. Pitt 58 *d*, 198 *a*
Arundel v. Pitt .. [213 *a*]
Asbee v. Shipley .. 197 *d*
Ashley v. Ashley .. [339 *d*]
Ash, Doe d., v. Calvert .. 272 *b*
Ashburnham v. Kirkhall .. 531 *c*
Ashton v. Ashton .. 80 *b*, 218 *g*
Ashton's case .. [315 *c*]
Askew v. Peddle [46 *c*, 510 *b*, 516 *a*]
——— v. Poulterers' Co. 269 *a*, 422 *e* [261 *a*]
Aslin v. Parker .. 433 *c*
Astley v. Milles .. [287 *a*] 478 *c*
Aston v. Aston .. 85 *a*
——— v. Exeter, Lord .. 32 *c*
Atherfold v. Beard .. 172 *a*
Athlone Peerage Case .. [167 *f*]
Atkins v. Owen .. [274 *c*]
——— v. Drake [186 *f*, 312 *e*, *bis.*]
——— v. Hatton .. [186 *f*, 313 *c*]
——— v. Humphreys .. [260 *c*]
——— v. Palmer 105 *a*, 119 *a*, 122 *k*
Atkinson v. Atkinson .. [204 *c*]
Atkyns v. Farr .. 233 *c*
——— v. Montague .. 398 *d*
——— v. Wright .. 37, 38 *b*
Attwood v. Barham .. 466 *a*
Atty. Gen. and Blair v. Cholmley 423 *b*
——— v. Bowman .. 234 *c*
——— v. Cashell, Corp. of [416 *d*]
——— v. Coventry, Mayor of 520 *b*
——— v. Colman .. 83 *g*
——— v. Culverwell, [167 *f*, 250 *a*]
——— v. Drummond [282 *a*, 292 *b*, 396 *c*]
——— v. Foster .. 281 *c*
——— v. Fowey, Mayor of, 220 *g*
——— v. Grote .. [282 *c*]
——— v. Haberdasher's Co. [522 *b*]

Page

Att. Gen. v. Higham [429 *a*, 460 *c*]
——— v. Lord Hotham 167 *b*
——— v. King 435 *g*, 436 *a*
——— v. Le Merchant 273 *d*
——— v. Lloyd .. 531 *a*
——— v. Lucas . 84 *e*
——— v. Milward .. [151 *d*]
——— v. Monkton .. 320 *a*
——— v. Nethercote [67 *e*, 73 *b*, 220 *h*, 221 *f*]
——— v. Parker .. 281 *c*
——— v. Parnther 251 *c*, 479 *c*
——— v. Pearson [172 *f*, 189 *g*]
——— v. Ray [150 *f*, 153 *a*, 158 *b*, 256 *b*]
——— v. Ray .. [135 *b*, 142 *g*]
——— v. Robson .. [529 *a*]
——— v. Rutter .. 281 *c*
——— v. Shore 396 *c*, [172 *f*,
——— v. Shore [292 *b*] 282 *a*,
——— v. Snow .. 524 *e*
——— v. Strutt .. [39 *d*, 39 *e*]
——— v. Taylor .. [160 *f*]
——— v. Treakstone 400 *f*
——— v. Thurnall .. 198 *m*
——— v. Warwick [167 *e* 312 *a*]
——— v. Wyburgh .. 355 *d*
——— v. Wilson .. [64 *a*]
Atwood v. ——.. [25 *d*, 27 *b*]
——— v. Hurrill .. [124 *a*
Auriol v. Smith .. [166 *c*, 264 *c*]
Austen v. Vesey .. [378 *c*]
Austin v. Hinton .. 222 *d*
——— v. Prince .. [76 *b*]
Aveson v. Kinnaird 316 *a*, 342 *a*
Aylet v. Easy .. [139 *d*]
Ayliffe v. Murray .. [540 *c*]
Aylward v. Hickson [61 *d*, 219 *b*, and *f*]
——— v. Kearney [58 *b*, 185 *c*, 186 *f*]
Ayrey v. Davenport .. 164 *e*

B.

Backhouse v. Crosby .. [290 *a*]
——— v. Middleton 262 *a*
Bagenal v. Bagenal .. 221 *f*
Baggaley v. Jones .. 309 *b*
Bagshawe v. —— .. [135 *b*]
Bailey v. Bidwell .. [174 *a*]
Bain v. Lashor .. [272 *b*]
Baker, *Ex parte* .. [544 *b*]
Baker v. Paine .. 280 *f*, 290 *a*
.. [289 *c*]
——— v. Thurnall . [506 *b*]

Page

Baker v. Tyrrhwitt .. 374 *a*
Balby v. Williams .. 218 *k*
Balch v. Symes .. 32 *b*
——— v. Tucker .. 231 *a*
Baldwin v. Peach .. [27 *e*]
Ball v. Dunsterville .. 177 *c*
— v. Montgomery [278 *a*, 289 *g*]
Balls v. Margrave .. [31 *f*]
Bally v. Kenrick .. 20 *c*
——— v. Williams .. 229 *a*, 245 *e*
Bamford v. Bamford [111 *k*, 509 *c*]
Banbury Peerage case 427 *c*, [246 *a*, 390 *a*, 475 *c*]
Banks v. Farques, *i. e.* Farquharson 189 *i*, 198 *b*, 495 *c*
—— v. Farquharson [181 *a*, 263 *e*]
Bannatyne v. Leader .. [34 *a*]
Banning, Doe d., v. Griffin 390 *a*
——— v. Griffith .. 320 *d*
Barber, *In re* .. [254 *f*, 541 *f*]
Barden v. Gorman .. [338 *c*]
Barret v. Buck .. [490 *a*]
Barfield v. Kelly .. 189 *g*
Barker v. Barker .. [365 *d*]
——— v. Dixie 50 *b*, 341 *g*, 342 *d*
——— v. Greenwood .. [507 *b*
——— v. Ray .. 314 *k*
Barnes, *Ex parte* [447 *c*, 543 *k*]
——— v. Abram .. [138 *c*]
——— v. Mawson .. 306 *b*
——— v. Stuart .. 498 *b*
——— v. Trompowsky 252 *d*, 264 *f*
Barnett v. Brandas .. [396 *b*]
——— v. Noble [30 *k*, 27 *d*, 38 *d*]
Barnsdale v. Lowe [142 *g*] 145 *d*
Barnsley v. Powell 90 *a*, and *c*, 91 *f*
Barraclough v. Johnson [305 *e*]
Barratt v. Hubert .. [135 *b*]
Barré, De, v. Livette 380 *f*, 384 *b*
Barrett v. Gore .. [338 *g*] 339 *g*,
——— v. Kemp .. [28 *b*]
Barrington v. O'Brien .. 196 *c*
Barron v. Grillard 34 *g*, 342 *e*
Barrow v. Greenhough 293 *b*, and *d*
——— v. Jameueau .. [447 *d*]
Barry v. Bebbington 310 *b*, 311 *d*
—— v. Jackson .. [414 *a*, 444 *c*]
Barstow v. Kilvington .. 289 *g*
——— Palmes . [259 *e*]
Bartholomew v. Stephens [149 *b*, 273 *d*]
Bartlett v. Pickersgill 292 *b*, [349 *e*, 434 *b*
——— v. Gillard .. 16 *a*, 466 *d*
Baskett v. Toosey .. 116 *i*
Batch v. Wilson .. [178 *e*]
Batchelor v. Searle .. [294 *b*]

Page

Bate v. Bate .. [30 *e*]
Bateman v. Bailey .. 304 *c*
——— v. Ross, Ces. of [442 *b*]
Bates, *Ex parte* .. 494 *b*
Bath, Earl of, v. Battersea 260 *f*
—— v. Montague .. 4 *b*
Bauerman v. Radenius .. 465 *c*
Bayley v. Hill .. 467 *a*
Baylie v. Wylie .. 164 *a*
Bayliss v. Att. Gen. .. [279 *e*]
Baynham v. Guy's Hospital 282 *a*
Beachcroft v. Beachcroft [284 *b*]
Beachinall v. Beachinall .. [525 *d*]
Bearblock v. Tyler 524 *f*, 525 *b*
Bearcroft v. Berkeley [509 *c*, 520 *b*]
Beard v. Travers .. [304 *a*]
Beasley v. Magrath .. 428 *e*
Beaufort, D. of, v. Taylor [44 *a*]
Beaumont v. Fell . 284 *a*
——— v. Mountain [148 *c*, 408 *a*]
Beckford v. Wildman .. 45 *g*
Beebee v. Parker .. 306 *a*
Beer v. Ward .. 185 *c*
Bell v. Clayton .. [174 *a*]
—— v. Francis .. [273 *d*]
—— v. Jackson .. 244 *b*
—— v. Smith .. 373 *a*
—— v. Tinney .. 437 *b*
Bellamy v. Jones 121 *e*, 122 *b*, [124 *g*]
——— v. Radcliffe .. [338 *b*]
Bellew v. Russel .. 340 *b*, 357 *e*
Belmore, Lord, v. Anderson 68, *c*, 119 *a*, [68 *c*, 104 *c*]
Bellwood, *Ex parte* .. [354 *e*]
Benfield, *Ex parte* .. [353 *b*]
Bengough v. Walker .. [282 *c*]
Bennett v. Jackson .. [67 *c*]
——— v. Meale 22 *e*, 232 *c*, 237 *b*
——— v. Neale .. [427 *f*]
——— v. Walker .. 457 *d*
Benson v. Chester .. [339 *a*]
——— v. Olive 250 *c* [272 *d*, 422 *c*]
Bent v. Allot .. [344 *b*]
—— v. Baker 346 *d*, 368 *c*, 375 *a*, 385 *c*
Bentinck v. Willink [4 *a*, 39 *e*]
Bentley v. Magrath .. [28 *d*]
——— v. Cook .. 342 *c*
Beresford v. Easthope .. [114 *g*]
Berkeley v. Berkely .. 145 *d*
——— v. Bradley .. [462 *b*]
——— Peerage case 319 *d*, 321 *d*, 325 *a*, [319 *d*, 323 *c*]
——— v. Watling .. [187 *c*]
Bermon v. Woodbridge .. 467 *e*
Bernal v. Marquess of Donegal 340 *d*
Bernardi v. Motteux 162 *e*, 164 *b*

Page

Bernett v. Taylor .. [181 *a*]
Berney v. Eyre .. [135 *b*]
Berry v. Phillpot .. 475 *c*
Berryman v. Wise 463 *e* [463 *d*]
Bertie v. Beaumont .. [312 *e*]
—— v. Falkland .. [282 *c*]
Bettison v. Farringdon 30 *l*, 35 *b*
Bevan v. Dyke .. 231 *a*
——— v. Williams .. 463 *f*
Beverley v. Craven .. [412 *d*]
Biddeford v. Partridge .. [127 *a*]
Biddulph v. St. John .. 4 *d*
Bignold v. Audland .. [538 *f*]
Binfield v. Lambert 179 *e*, [181 *a*]
Binford v. Dommitt .. 496 *b*
Bingloe v. Goodson .. [271 *c*]
Binnington v. Harwood .. 17 *a*
Binstead v. Coleman .. 290 *a*
Birce v. Bletchley .. 231 *g*, 245 *a*
Birch v. Walker .. 200 *b*, 221 *d* [202 *a*]
Bird v. Bletchley .. [277 *a*]
—— v. Hardwicke .. 83 *g*
—— v. Lovelace . [378 *c*]
—— v. Owen .. [339 *a*]
Birt v. Kershaw .. 362 *a*, 365 *e*
—— v. Rothwell .. 407 *b*
—— v. White .. 122 *d*, 143 *a*
Bishop v. Burton [181 *d*, 261 *d*]
——— v. Church . 495 *b*
Black v. Lord Braybrook 152 *k*, 155 *c*
Blackett v. Lowes .. 306 *f*
——— v. Weir .. 353 *b*, 359 *b*
Blackham's case . 444 *b*
Blackmore v. The Glamorganshire Canal Co. .. 540 *f*, [537 *e*]
Blacquire v. Hawkins .. 253 *d*
Blake v. Marvell [277 *a*, 287 *a*] 232 *b*, 458 *a*
—— v. Vesey .. 242 *e*
Bland v. Armagh, Abp. of, 220 *k*, 222 *b*, [225 *a*]
Bligh v. Berson .. 34 *a*
——— v. Wellesley .. 269 *f*
Bliss v. Collins .. 531 *k*, and *j*
Blount v. Burrow .. 467 *d*
Blower v. Ketchmere 163 *d*, 259 *d*, 269 *e*
Bloxton v. Drewitt 189 *e*, and *i*
Blundell v. Howard .. 236 *d*
——— v. Gladstone [105 *a*, 282 *c*, 286 *b*, 392 *a*, 530 *c*, and *d*]
Blunt v. Comyns .. 280 *f*
Boardman v. Jackson 15 *c*, 468 *c*, [429 *a*, 467 *a*]
Bohtlingk v. Inglis .. 448 *b*
Boldney v. Ritchie .. 274 *c*

Page

Bolton v. Corporation of Liverpool 39 *e*, 40 *e*, [42 *a*]
——— v. Gladstone .. 445 *f*
Bond v. Bond . [127 *a*]
Bonham v. Leigh .. 112 *e*
Boning v. Sprott .. 208 *k*
Bonus v. Flack .. 516 *a*, 520 *e*
Booker v. Allen 298 *e*, 300 *b*, [282 *c*]
Bootle v. Blundell 184 *e*, [179 *b*, 184 *d*, 187 *b*, 527 *e*]
Booth v. Parker .. [511 *e*]
Bordieu v. Rowe .. [118 *a*]
Borough v. Whichcote .. 422 *c*
Bott v. Bird .. [428 *c*]
Botts v. Verelst 122 *d*, [121 *g*]
Boughton v. Pierrepoint 222 *e*
Boultbee v. Boultbee .. 437 *c*
Bourdieu v. Trial .. 120 *e*
Bourdillon v. Alleyne .. [120 *c*]
Bourne v. Gatliff .. [281 *a*]
——— v. Mole .. [44 *a*]
——— v. Turner .. [359 *a*]
——— v. Whitmore .. [259 *c*]
Bowden v. Hodge 113 *k*, 117 *a*, 119 *b*, [114 *g*]
Bowen v. Kirwan .. [288 *f*]
Bowerman, Doe d., v. Sybourne 426 *g*, 427 *b*
Bowles v. Langworthy .. 173 *a*
——— v. Parsons .. [519 *c*]
Bowman v. Bowman [184 *e*, 526 *a*]
——— v. Horsey .. [280 *f*]
——— v. Rodwell 78 *b*, 79 *k*, 378 *d*
Bowser v. Colby [173 *f*, 188 *e*]
Bowyer v. Mac Evoy .. 335
——— v. Mc Evor .. [545 *c*]
——— v. Pritchard 29 *b*, [340 *f*, 428 *g*]
Boys v. Trapp .. [137 *f*]
——— v. Williams 282 *c*, *bis*, [282 *c*, 285 *b*, 287 *a*]
Brabant v. Perin .. [111 *e*]
Brace v. Black .. [174 *a*]
——— v. Ormond .. 172 *b*
Bradish v. Gee .. 458 *c*
Bradshaw v. Bradshaw 79 *k*, [108 *d* and *e*]
Brady v. Cubitt .. 301 *d* and *e*
Braham v. Bowes 302 *g*, 542 *b*
Brain v. Prim .. [310 *b*, 314 *c*]
Braithwaite v. Hitchcock [155 *e*]
Brandon, Doe d., v. Calvert 477 *c*
Braner v. Mitford .. [509 *c*]
Bransby v. Kerrick .. 444 *a*
Brasbridge v. Woodroffe [294 *c*]
Bray v. Bulky .. 214 *e*
—— v. Bulkby .. [208 *c*]

Page

Bray v. Phillpot .. 475 *a*
Braye Peerage case .. [482 *b*]
Brazier v. Mytton .. [306 *k*]
Breeze v. English .. [490 *a*]
Bretton v. Cope .. 166 *c*
Brewster v. Sewill .. 270 *b*
Bridge v. Bridge .. [196 *e*]
Bridges v. Chandos, Duke of 309 *k*, 480 *c*, [278 *a*, 284 *e*]
——— v. King .. [472 *a*]
Bridgewater's case, Lord 398 *c*
Bright v. Woodward .. [107 *b*]
Brind v. Bacon .. 373 *a*
Brindley v. Woodhouse [250 *a*, 269 *f*, 270 *k*]
Bringlow v. Goodson .. [462 *b*]
Brisco v. Lomax . [306 *g*]
Bristol, Mayor of, v. Whiston [339 *b*]
Brockman's case .. [160 *c*]
Brodie v. St. Paul 290 *a*, [278 *a*, 287 *a*]
Brograve v. Winder [263 *e*, 366 *a*, 368 *f*]
Bromage v. Rice .. [267 *b*]
Brooks v. Taylor .. [421 *c*]
Broughton v. Harpur .. 350 *f*
——— v. Randal 254 *b*, 487 *e*
Brounker, Lord, v. Atkyns 398 *b*
Brown's case .. 257 *a*
Browne v. Barnard .. 152 *d*
Brown v. Brown 359 *b*, [137 *c*]
——— v. Child .. [124 *a*]
——— v. Greenby, or Granby [143 *b*, 366 *b*, 367 *a*]
——— v. Hayward [28 *k*, 180 *a*]
——— v. Kirwan .. [379 *d*]
——— v. Langley .. [286 *b*]
——— v. Thompson 301 *c*, 302 *k*
——— v. Thomson .. [32 *d*]
——— v. Thornton [15 *a*, 149 *c*, 227 *f*]
——— v. Vermueden .. [109 *d*]
——— v. Woodman .. [247 *b*]
Browning v. Barker 201 *b*, 221 *e*
——— v. Barton .. 201 *a*
Brownsword v. Edwards 81 *d*, 83 *a*, [442 *b*]
Brune v. Rawlins .. 266 *g*
Brunett v. Lee .. [537 *e*]
Brunswick, D. of, v. Hanover, K. of, [10 *g*, 65 *f*]
Bruin v. Knott .. [167 *c*]
Brunt v. Wardle .. [139 *a*]
Bryan v. Anderson .. [427 *e*]
——— v. Booth .. 163 *e*
Bruyerus v. Halcombe .. [439 *b*]
Brydges v. Branfill [110 *c*, 137 *c*]
——— v. Hatch .. [121 *k*]
Brymer v. Buchanan .. 90 *k*

Page

Buchannon v. Rucker .. 446 *h*
Buckhouse v. Crosby .. 290 *a*
Buckland v. Tankard 362 *a*, 365 *e*
Buckley v. Littlebury .. [294 *c*]
Buckmaster v. Harrop 355 *a*, 536 *g*
Buden v. Dore .. 32 *e*
Bugnold v. Green .. [121 *f*]
Bulkley v. Wilford .. 530 *b*
Bunbury v. Bunbury [39 *g*, 378 *f*, 380 *e*]
Bunce v. Thompson [165 *g*, 396 *b*]
Bunter v. Warre 361 *a*, 363 *a*
Bunting v. Lepingwell .. 440 *a*
Burdon v. Browning .. 434 *b*
Burin v. Knott .. [253 *d*]
Burlace v. Cooke .. 85 *b*
Burling v. Paterson [176 *d*, 264 *a*]
Burlton, *Ex parte* .. 83 *k*
Burn v. Burn .. 111 *e*
Burnett v. Lynch .. 173 *a*
Burrows v. Gradin .. [359 *c*]
Burrowes v. Lock .. [176 *e*]
——— v. Locke .. 385 *a*
Burt, *Ex parte* .. 354 *a*
——— v. Walker .. 252 *d*
Burton v. Hinde .. 355 *e*
——— *In re* .. 545 *b*
——— v. Maloon .. [544 *b*]
——— v. Neville .. [32 *e*, 34 *c*]
Busby v. Greenslate .. 362 *b*
Bush v. Peacock .. [46 *d*]
Bussford v. Blakesley [39 *e*, 42 *d*]
Butcher v. Oldworth .. 512 *a*
Bute, Mar. of, v. Glam. Canal Co. [30 *c*, 36 *d*, 37 *b*, 43 *d*]
Butler v. Bulkeley .. [113 *d*]
——— v. Moore .. 381 *c*
Butlin v. Barry .. [220 *h*]
Butterworth v. Bayley .. 18 *e*
——— v. Robinson .. 454 *a*
Button v. Price .. [533 *e*]
Buxton v. Cornish .. [391 *b*]
Byrne v. Byrne .. [123 *a*]
——— v. Frere [69 *b*, 106 *a*, 200 *c* 259 *e*]

C.

Caernarvon, Earl of, v. Villebois, [307 *d*, 434 *d*]
Cahill v. Shepherd .. 116 *f*
Calcot v. Mayher [15 *a*, 429 *a*]
Caldecott v. Hodgson .. [286 *b*]
Call v. Dunning .. 176 *a*
Callaghan v. Rochfort 208 *f*, 209 *a*, 330 *e*

Page

Callow v. Mince 374 *b*, [366 *b*]
Calvert v. Canterbury, Abp. of, 314 *d*
Campbell v. Campbell .. [517 *c*]
——— v. Dickens .. [54 *b*]
——— *Ex parte* .. 354 *b*
——— v. French 44 *a*
——— v. Scougal 102 *f*, 105 *a*, 223 *f*, 224 *a*, [127 *a*, 222 *c*]
——— v. Tremlow .. 342 *b*
Cann v. Cann 144 *b*, [121 *b* and *c*, 141 *a*, 203 *e*]
Cant v. Beauclerk 227 *d* and *e*
Capon v. Miles .. 21 *d*
Carbonell v. Bessell .. [114 *g*]
Careless v. Careless .. [286 *b*]
Carew v. Johnstone .. 233 *b*
——— v. White .. [43 *d*]
Carey v. Adkins .. 345 *a*
——— v. O'Shannery .. [317 *d*]
——— v. Pitt .. 265 *f*, 266 *a*
Carleton v. Brightwell 51 *e*, 191 *d*
——— v. Smith .. 46 *b*
Carlos v. Brook .. 207 *a*
Carne dem. Nichol ten. .. [309 *a*]
Carnon v. Bowles .. 454 *b*
Carpenter v. Powis .. [80 *k*]
——— v. Rutter .. [271 *c*]
Carpmael v. Powis [39 *g*, 78 *a*, 87 *k*]
Carr v. Appleyard .. [137 *f*]
Carrington v. Cornock 250 *b*, 259 *e*, 261 *b*, [258 *g*]
——— v. Jones 313 *b*, 375 *e*, [336 *d*, 528 *d*]
———, Lord, v. Payne [181 *a*]
Carstairs, *Ex parte* .. [278 *a*]
Carter v. Abbott .. 373 *c*
——— v. Draper . 102 *g*
——— v. Colraine, Lord 467 *a*
——— v. Pearce .. 350 *c*, 363 *a*
Cartwright v. Cartwright [180 *a*]
——— v. Green ... 1 *b*, 83 *f*
——— v. Williams . 374 *e*
Casborn v. Barham .. [390 *a*]
Casey v. Beachfield .. 339 *a*
Cassan v. Skinner .. [174 *a*]
Castleton v. Turner [278 *a*], 285 *d*
Cattell v. Corrall [304 *e*, 379 *b*, 458 *d*]
Catterall v. Purchase .. 534 *b*
Cavan v. Stewart .. 155 *b*, 159 *c*
Cazenove v. Vaughan 223 *e*, 257 *a* and *d*
Ceal v. Ashurst .. 531 *b*
Chad v. Tilsed .. 281 *f*
Chaffen v. Wills .. 509 *e*
Chalk v. Thompson .. 521 *b*
Chalmer v. Bradley 196 *a*, [246 *a*, 390 *a*]

Page

Chamberlain v. Agar .. 293 *b*
———, v. *Ex parte* 87 *h*, 353 *c*, 369 *a*, [80 *e*, 84 *e*]
Chambers v. Dunsany, Lord [421 *d*]
——— v. Queen's Proctor [388 *c*]
Chamean v. Riley .. [127 *a*]
Chamley v. Dunsany, Lord [422 *e*]
Champion v. Atkinson .. 235 *i*
Champney's case .. [5 *b*]
Chandos, Duke of, v. Talbot 28 *g*
Chapman's case .. 351 *a*
Chapman, *In re* .. [285 *d*]
——— In the goods of [297 *a*]
——— v. Beard 480 *a*, [463 *d*]
——— v. Emery .. 287 *b*
——— v. Parson .. [204 *c*]
——— v. Salt .. 299 *e*
——— v. Smith .. 524 *d*
——— v. Whitby . [204 *c*]
Chappell v. Purday .. [428 *f*]
Charitable Corp. v. Sutton 370 *f*, [222 *b*]
Charles v. Rowley .. 422 *a*
Charlton v. Gibson .. [280 *f*]
——— v. Robson [71 *b*, 223 *e*]
Chatfield v. Fryer .. 305 *a*
Chattle v. Pound .. 185 *e*
Cheesewright v. Franks [165 *f*]
Chemiant v. Delacour 117 *d* and *e*
Chennell v. Martin .. 520 *c*
Chenney's case, Lord .. 285 *d*
Cheney's case .. [283 *d*]
Chervet v. Jones 29 *c*, [391 *b*, 428 *g*]
Chetwynd v. Lindon .. 83 *e*
Cheyne v. Coops .. 373 *b*
Chichester v. Philips .. 414 *e*
Chicot v. Lequesne .. 542 *c*
Chidwick v. Pribble [31 *d*, 142 *a*]
Child v. Winwood .. 235 *e*
Childrens v. Saxby [6 *a*, 269 *c*]
Chimell v. Chauvett [114 *g*, 545 *b*]
Chitty v. Dendy .. [396 *b*]
——— v. East India Co. 110 *a*
——— v. Selwyn .. [114 *g*]
Cholmondley, Lord, v. Clinton, Lord 198 *f*, 220 *b*, 224 *b*, [531 *g*]
——— v. Oxford, Earl of 122 *e*
Christian v. Taylor .. [38 *c*]
——— v. Wren .. 195 *d*
Christie, *In re* .. [525 *f*]
——— v. Secretan .. 445 *b*
Christopher —— v. [540 *b*, 543 *e*]
——— v. Christopher 301 *d*
Christ's Coll. Cam. v. Widdrington, [4 *b*]
Christy, *Ex parte* v. Barrow [543 *h*]
Clagett v. Philipps [39 *g*, 42 *a*, 381 *a*, 382 *f*]

Page

Clapham v. Shillito .. [529 *a*]
Clare v. Wood .. [188 *c*]
Claridge v. Hoare 1 *b*, 81 *d*, 83 *g*
Clark v. Bedford .. 314 *d*
Clarke, *Ex parte* .. [396 *b*]
——— v. Jennings 189 *i*, 197 *b*
Clark v. Mullick .. [154 *c*]
——— v. Periam .. 233 *b* and *c*
——— v. Turton .. 231 *c*
——— v. Wilmot [309 *g*, 354 *a*, 464 *c*]
Clarkson v. Hanway .. 288 *e*
——— v. Woodhouse .. 311 *a*
Clayton v. Gregson .. [280 *f*]
——— v. Gresham .. [414 *a*]
——— v. Nugent, Ld. [278 *a* and *b*]
——— v. Winchelsea, Earl of [21 *d*]
Clementi v. Golding .. 397 *b*
Clendinning v. O'Malley [540 *c*, 540 *d*, 543 *c*]
Clergy, Sons of, Corp. of, v. Swainson [460 *c*]
Clifford v. Turrall . [288 *b*]
Clinan v. Cooke 291 *d*, [278 *a*, 287 *a*, 289 *f*]
Clinton v. Peaboody .. [120 *f*]
Clothier v. Chapman .. 305 *b*
Clotworthy v. Mellish .. 211 *a*
Clovin v. Campion .. [114 *g*]
Clowes v. Higginson .. [291 *d*]
Cluett v. Hooper [315 *a*]
Clutton v. Cheny .. [10 *a*]
Coates v. Coates .. [194 *b*]
——— v. Mudge .. [275 *c*]
Cobden v. Kendrick 382 *b*, 383 *e*
Cock v. Donovan 115 *e*, [114 *g*]
Cockburn v. Hussey .. [537 *e*]
Cockerill v. Cholmeley .. 202 *c*
Cocking v. Jarrard .. 375 *b*
Cockman v. Mather .. 398 *f*
Codd, *Ex parte* .. [353 *c*]
Coffin v. Coffin .. [214 *c*]
Cogan v. Williamson .. [249 *d*]
Coghlan v. Williamson 252 *d*, 264 *e*
Cojamoul v. Verelst .. [114 *g*]
Coke v. Fountain 260 *a*, 261 *a*
Coker v. Farewell .. 258 *c* and *g*
Colchester, Mayor of, —— v. 339 *a*
——— Mayor, &c. of, v. —— [339 *d*, 356 *d*, 375 *c*]
Cole v. Gibson .. 269 *a*
—— v. Gray .. 345 *c*
Coles, *Ex parte* .. [114 *g*, 118 *a*]
Colledge v. Horn . 458 *e*
Collett v. Collett .. [470 *a*]
——— v. Jaques .. [479 *a*]
Coley v. Coley .. 199 *g*
Collins v. Archer .. 85 *h*
——— v. Carnegie .. [154 *e*]

Page

Collins v. Maule [157 *a*, 167 *c*, 304 *d*]
Colman, *In re* .. 545
——— v. Sarrell 231 *a*, [182 *b*]
Colpoys v. Colpoys .. [282 *c*]
Colson v. Colson .. 531 *d*, and *e*
Colvin v. Campion .. [529 *a*]
Combe v. London, Corp. of, [30 *c*, 36 *d*, 39 *f*, 42 *a*]
Combes v. Spencer [210 *a*, 417 *b*]
Combs v. Proud . 534 *b*
Compagnon v. Martin .. 239 *e*
Concannon v. Cruise .. [181 *d*]
Conethard v. Hasted .. [139 *c*]
Connoly v. Howe, Lord [284 *c*]
Connop v. Hayward [490 *c*, 492 *b*]
Canway v. Beasley [4 *a*, 167 *f*, 295 *b*]
Cood v. Cood .. [167 *f*]
Cook v. Broomhead .. [139 *d*]
——— v. Fountain 355 *a*, [357 *e*]
Cooke v. Booth .. 282 *a*
——— v. Clayworth .. 4 *d*
——— v. Maxwell .. 87 *b*
——— v. Sholl .. 436 *b*
——— v. Tanswell .. 275 *a*
——— v. Wilson 220 *f*, [101 *a*, 220 *e*]
Cookes v. Hellier .. 269 *b*
Cookson v. Ellison [21 *a*, 24 *d*]
Cooper v. Marsden . 314 *e*
——— v. Thornton .. [519 *c*]
Coote v. Boyd .. 295 *a*
——— v. Coote .. 116 *e*, 295 *c*
Cooth v. Jackson 4 *d*, 92 *b*, 105 *a*, 111 *d*, [71 *b*]
Cope v. Parry .. [366 *b*. 367 *a*]
Copeland v. Mape .. [519 *c*]
——— v. Stanton 111 *d*, 221 *c*, 225 *a*, [69 *a*]
Corbett v. Corbett [259 *b*, 526 *g*, 527 *a*]
Corfield v. Parsons .. [325 *b*]
Cornish v. Acton [196 *b*, 518 *c*]
Cory v. Gertegan .. [195 *e*]
Costa, Da, v. Pym .. 266 *c*
——— v. Jones .. 215 *a*
Cotterrall v. Purchase .. [536 *d*]
Cottington v. Cottington .. 446 *c*
Cotton v. Luttrel .. [344 *b*]
——— v. Wilson .. [179 *a*]
Courtenay v. Williams [310 *a*, 462 *a*]
Courtnay v. Hoskins 193 *c*, 200 *a*, 223 *d*
Coventry v. Athill [121 *c*, 133 *b*]
——— v. Coventry . [127 *a*]
Cow v. Kinnersley [114 *g*, 115 *d*]
Cowper v. Cowper .. 269 *e*
Cowslad v. Cely .. 252 *a*
Cowslade v. Cornish 518 *a*, [70 *a*, 106 *f*]

Page

Cox v. Allingham 199 *b*, 414 *d*, [36 *a*, 414 *b*]
——— v. Copping .. 171 *e*
——— v. Worthington .. 215 *a*
Coxe v. Philips .. 215 *a*
Cragg v. Norfolk .. 416 *d*
Crank v. Frith [174 *b*, 251 *b*, 331 *c*]
Cranstoun, Lord, v. Johnston 4 *d*, 41 *b*
Crauford v. Att. Gen. .. [354 *e*]
Craven v. Tickel .. 356 *f*
Crawford v. O'Sullivan [212 *b*]
Crease v. Barrett [305 *e*, 308 *e*, 309 *k*, 315 *b*, 464 *a*]
——— v. Penprase .. [30 *k*]
Creed v. Creed .. [545 *c*]
Creswick v. Creswick .. [139 *d*]
Cridland, *Ex parte* .. [447 *c*]
Crockett v. Rishton .. [543 *d*]
Croft (or Cutts) v. Pickering 383 *d*
——— v. Pyke .. 357 *e*
Cromack v. Heathcote 41 *b*, 380 *d*
Crone v. O'Dell .. [519 *c*]
Crooke v. Edwards .. 353 *c*
Crookhall v. Smith .. [340 *b*]
Croone v. Lidiard [278 *a*, 289 *a*]
Crosby v. Percy .. 252 *d*
Crosley v. Clare .. [285 *b*]
Crosse v. Bedingfield [12 *a*, 269 *d*]
Crossham v. Goldney .. 360 *b*
Croughton v. Blake [166 *b*, 173 *e*, 186 *f*, 422 *d*, 424 *a*]
Crow v. Carleton .. [490 *c*]
Crowley v. Page .. [204 *d*]
Crowther v. Hopwood .. 333 *e*
Culpepper v. Fairfax .. [353 *a*]
Cunliff v. Sefton .. 252 *d*
Cunliffe v. Taylor .. [312 *e*]
Cunyngham v. Cunyngham 536 *f*
Curd v. Curd .. [38 *d*, 490 *a*]
Curre v. Bowyer .. 223 *a*
Curtis v. Rickards 187 *c*, 390 *a*
Cuthbert v. Gostling 362 *c*, 363 *a*
Cuthbert v. Peacock .. [294 *b*]
Cutler v. Cremer .. [138 *c*]
Cutts v. Pickering .. [378 *c*]

D

Da Costa v. Jones .. 215 *a*
——— v. Pym .. 266 *c*
D'Aglee v. Fryer [167 *f*, 307 *e*]
Dagley v. Crump .. 11 *a*
Daintry v. Daintry . 531 *g*
Dalrymple v. Dalrymple .. 447 *f*
Dalston v. Coatsworth .. 260 *c*
Dalton v. Carr .. [139 *d*]
Daly v. Kelly .. 241 *c*, 462 *d*

Page

Daniell, *In re* .. 544 *d*
Daniells v. Davidson .. 243 *c*
Darling v. Staniford .. 63 *c* [106 *a*]
Darston v. Oxford, Earl of, [6 *a*]
Dartmouth, Corp. of, v. Holdsworth [380 *e*]
——— Lady, v. Robarts 428 *g*
Darwin v. Clarke .. 34 *d*, 37 *c*
Dashwood v. Lord Bulkeley 536 *g*
Davenport v. Coltman .. [282 *c*]
Davers v. Davers .. 192 *e*
Davids v. Carr .. [174 *b*]
Davies *dem.* Lowndes, *ten.* [173 *e*, 267 *b*, 318 *c*, 319 *e*, 422 *d*]
——— v. Pierce 309 *b*, [309 *a*]
——— v. Humphreys [309 *a*]
Davis v. Davis .. 522 *a*
——— v. Dinwoody 341 *g*, 343 *a*
——— v. Harford .. [46 *c*]
——— v. Lloyd .. [167 *f*, 307 *e*]
——— v. Lowndes [121 *d*, 125 *a*]
——— v. Reid .. 79 *e*, 87 *g*
——— v. Selby [317 *a*, 318 *c*, 319 *c*, 324 *b*]
——— v. Spurling 16 *e*, [429 *a*]
——— v. Symonds .. [278 *a*]
——— v. Turnbull 115 *f*, [112 *g*]
——— v. Waters .. [381 *a*]
Dawson v. Ellis .. [11 *d*]
——— v. Gregory .. [435 *a*]
——— v. Massey .. [4 *d*]
Day v. Savadge .. 253 *d*
Debeze v. Mann [297 *c*, 298 *f*]
Debrox ——— v. .. 223 *c*, 258 *b*
Dedore v. Day .. [220 *f*]
Delany v. Tenison 275 *b* [269 *c*]
Delatorre v. Bernales .. 26 *c*
Delmare v. Robello [284 *c*, 285 *d*]
Demanneville v. Demanneville [494 *b*]
Denby's case .. 413 *c*
Deneus v. Codrington .. [378 *c*]
Deniston v. Little .. 243 *e*
Denn v. Fulford .. 152 *b*, 158 *b*
——— v. Spry .. 306 *a*
D'Eon, Chevalier's case .. 215 *a*
Desborough v. Rawlins [39 *g*, 42 *b*]
De Symonds v. Delacour 346 *a*, 376 *b*
De Tastet v. Bordenave .. 526 *a*
Davenish v. Baines .. 293 *b*
Dew v. Clerke .. [124 *e*]
Digby, Earl of, v. Howard 479 *c*
——— v. Stedman .. 314 *c*
Dines v. Scott .. [515 *h*]
Dingle v. Rowe .. [90 *b*, 138 *c*]
Dister, *Ex parte* .. [525 *d*]

Page

Dixon v. Parker 338 *d*, 340 *f*, [338 *c*]
——— v. Redmund .. 26 *c*
Docksey v. Docksey .. [294 *c*]
Doddington v. Hudson .. 346 *c*
Dodswell v. Nott .. 355 *e*
Doe v. Allen .. [283 *d*]
——— v. Andrews .. 383 *g*
——— v. Arkright .. [169 *a*]
——— v. Barton .. [310 *c*, 318 *c*]
——— v. Beynon [185 *c*, 283 *d*, 284 *b*]
——— v. Bird .. [457 *c*]
——— v. Bridges .. [404 *e*]
——— v. Brynder .. [186 *f*]
——— v. Burt .. 282 *c*
——— v. Calvert 272 *b*, 477 *c*, [444 *a*]
——— v. Caperton [174 *b*, 186 *c*, 251 *g*, 271 *c*]
——— v. Carr .. [288 *d*, 386 *a*]
——— v. Chambers [174 *b*, 177 *a*]
——— v. Colcombe .. [310 *b*]
——— v. Cole .. [311 *f*]
——— v. Coulthred .. [462 *b*]
——— v. Dale .. [64 *a*, 84 *b*]
——— v. Edwards . [154 *c*, 413 *e*]
——— v. Egremont, Earl of, [78 *d*]
——— v. Freeman [155 *e*, 167 *b*]
——— v. Gatacre .. [168 *b*]
——— v. Graham .. [249 *a*]
——— v. Grazebrook .. [353 *f*]
——— v. Green .. [309 *a*]
——— v. Griffin .. 390 *a*
——— v. Gunning [154 *b*, 414 *g*]
——— v. Hardy .. [156 *b*]
——— v. Harvey .. [172 *g*]
——— v. Hawkins .. [310 *b*]
——— v. Heming .. 173 *a*, 308 *a*
——— v. Hiscocks .. [283 *d*]
——— v. Hodgson .. [275 *c*]
——— v. Horton .. [283 *c*]
——— v. Jersey, Ld., .. [282 *c*]
——— v. Jesson .. 488 *b*
——— v. Lancashire .. 302 *b*, and *e*
——— v. Lea .. [285 *a*]
——— v. Lloyd [157 *a*, 314 *c*, 417 *c*]
——— v. Maningham .. 405 *d*
——— v. Mason .. 482 *d*
——— v. Meds .. [283 *d*]
——— v. Mobbs .. [310 *b*]
——— v. Napean .. [483 *a*]
——— v. Needs .. [286 *b*]
——— v. Newton .. [266 *g*]
——— v. Ormerod .. [319 *f*]
——— v. Owen [186 *f*, 274 *a*, and *c*, 275 *c*]
——— v. Pearce .. [185 *c*]
——— v. Penfold [174 *b*, 272 *f*, 483 *a*]
——— v. Pulman [173 *e*, 269 *f*, 311 *a*]

Page

Doe v. Ridgway .. 316 *a*
—— v. Roberts .. [165 *g*, 166 *a*]
—— v. Robson .. [309 *a*]
—— v. Ross 155 *d*, 247 *b*, 268 *c*, 270 *h*, 272 *a*, 275 *c*
—— v. Samples [185 *c*, 186 *f*]
—— v. Savage [311 *e*, and *f*, 159 *f*, 173 *e*]
—— v. Seaton .. [464 *a*]
—— v. Sellers .. [156 *b*]
—— v. Staney [310 *b*, 314 *c*, 465 *d*]
—— v. Statham .. [283 *b*]
—— v. Sucklemore .. [266 *g*]
—— v. Sybourne .. 477 *a*
—— v. Terry .. [311 *a*, 479 *b*]
—— v. Tyler .. [336 *d*]
—— v. Thynne, Ld. Geo., 453 *e*
—— v. Tooth 355 *a*, 356 *b*, and *c*
—— v. Turford .. 315 *b*, [300 *g*]
—— v. Turner .. [324 *d*]
—— v. Vowles .. [310 *b*, 312 *a*]
—— v. Waterton .. 481
—— v. Wainewright [271 *b*, 272 *f*, 311 *f*, 463 *a*, 464 *a*]
—— v. Wheeler .. [281 *b*]
—— v. Williams .. [268 *c*]
—— v. Wolley .. 85 *c*
—— v. Young .. [478 *f*]
Dutton v. Colt .. [65 *f*]
Dolder v. Lord Huntingfield 400 *b*
Dolman v. Pritman .. [76 *b*]
Dolphin v. Dolphin [427 *e*, and *f*]
Domville v. Solly .. 459 *e*
Donaldson v. Thompson 445 *f*, and *h*
Donegal, M. of, v. Salt [270 *f*]
Donerail v. Donerail .. 233 *d*
Donnison v. Elsley .. [307 *a*]
Doran's case .. [65 *f*]
Dormer v. Ekins .. [170 *e*, 171 *d*]
Dormer v. Fortescue .. 27 *b*
Douglas cause .. 322, 451 *b*
Dove v. Dove .. [134 *a*, 142 *g*]
Dowdeswell v. Knott .. [355 *b*]
Dowley v. Winfield .. [483 *a*]
Downing v. Townsend 329 *b*, 339 *g*
Drake v. Woodford .. [509 *a*]
Drakeford v. Wilks .. 293 *b*
Drayson v. Peacock .. [179 *e*]
Drew v. Prior .. [267 *b*]
Drinkwater v. Combe .. 478 *c*
———— v. Porter .. [305 *e*]
Driver v. Wright .. [32 *d*]
Druce v. Denison [279 *b*, 282 *c*, 285 *d*]
Drury v. Drury .. [366 *b*]
Dryden v. Frost .. [543 *b*]
Du Barré v. Livette 380 *f*, 384 *b*

Page

Du Barrey v. Pouset .. [381 *c*]
Dubost, *Ex parte* .. 297 *d*
Dufferin Peerage case [150 *a*, and *c*]
Dummer v. Chippenham, Corp. of, [356 *d*]
Duncan v. Scott .. 153 *b*
Duncannon v. Campbell .. 90 *k*
Dungannon, Ld., v. Skinner [340 *a*, *bis*]
Dunn v. Calcraft .. 458 *b*
Dunne v. Ferrell .. [519 *c*]
Dupays v. Shepperd .. 400 *d*
Dupuy v. Freeman . [220 *k*]
Durham v. Newcastle-upon-Tyne [220 *f*]
Dursley v. Fitzharding .. 145 *d*
Durston v. Lord Oxford .. 467 *a*
Dutton v. Colt .. 257 *a*
Dyott v. Anderton .. 517 *a*

E.

Eade v. Lingood 189 *f*, 339 *g*, [173 *e*, 180 *b*, 181 *e*, 338 *g*, 421 *c*, 422 *e*, 437 *c*, 493 *b*]
Eades v. Harris .. [492 *a*]
Eagleton v. Kingston .. [265 *b*]
Earle v. Pickin .. 202 *c*, 388 *b*
East India Co. v. Campbell 83 *g*
———— v. Donald [4 *d*], 5 *a*, 228 *a*
———— v. Keightly 11 *d*, [428 *b*, 465 *a*]
———— v. Naish 122 *h*, 252 *f*
———— v. Neave 81 *d*, 84 *c*
Eastham v. Liddell .. 214 *e*
Eaton v. Jervis .. [267 *b*]
—— v. Scott .. 176 *f*
Ebden v. Prince .. 115 *d*
Eccleston v. Speke, alias Petty 28 *d*, 428 *d*
Ede v. Knowles [277 *a*, 288 *g*]
Eden v. Blake .. [277 *b*]
—— v. Bute, Earl of 212 *b*, 534 *a*, [212 *b*, 282 *b*, 533 *c*]
—— v. Smith .. [282 *c*, 310 *b*]
Edenborough v. Canterbury, Abp. of 281 *c*
Edge v. Salisbury .. [286 *b*]
Edney v. Jewell .. 244 *a*
Edwards v. Harvey . [319 *c*]
———— v. Jones [37 *a*, 38 *d*, 38 *f*]
———— v. Morgan .. [139 *d*]
———— v. Pool .. 46 *a*
———— v. Rees .. [310 *b*]
———— v. Sherin .. [400 *k*]

Page
Egerton v. Jones .. [521 *d*]
Elden v. Keddefl .. 414 *d*
Eldridge v. Knott .. 484 *c*
Eleanor Hall .. .. [445 *k*]
Ellenborough, Earl of, v. Germaine [259 *e*]
Elliot v. Williams .. 111 *c*
Ellis v. Deane [186 *d*, 191 *b*, 338 *e*, 370 *e*, 495 *c*]
—— v. Hardy .. [282 *c*]
—— v. King .. [138 *c*]
—— v. Medlicott .. [186 *c*]
—— v. Sinclair .. [542 *b*]
Ellison v. Cookson 474 *a*, [474 *b*], 478 *a*
Elsley v. Donnison .. [312 *e*]
Elston v. Wood .. 28 *e*
Elwarthy v. Bird .. 459 *a*
Ely, Bishop of, v. Gibbons [441 *c*]
—, D. and C. of, v. Stuart 61 *b*, 155 *e*
—, Dean of, v. Stewart [185 c]
—— v. Warren 145 *d*, 235 *f* and *k*, 243 *a*
Emerson v. Boville 302 *f* and *i*
Emery v. Grocock .. 477 *c*
England v. Downes .. [507 *b*]
—— v. Slade .. 481 *a*
Errington v. Atty. Gen. .. 513 *f*
Erskine v. Bize .. 39 *b*
Ess v. Truscott .. .. [459 *b*]
Evans v. Bicknell .. 4 *d*, 476 *e*
—— v. Evans .. [72 *d*, 233 *a*]
——, *Ex parte* .. [478 *f*]
—— v. Getting [306 *g*, 398 *f*]
—— v. Knight [204 *c*, 233 *b*, 349 *g*]
—— v. Lake .. 314 *a*
—— v. Rees .. [306 *g*]
—— v. Richard .. 31 *d*, 35 *d*
—— v. Taylor [160 *d*, 166 *a*]
—— v. Williams 365 *d*, 367 *d*
—— v. Yeatherd .. 353 *b*
Everard v. Warren .. 364 *b*
Everett v. Prythergh .. [218 *k*]
Everingham v. Roundell [247 *b*, 268 *c*]
Ewens v. Gold .. 354 *a*
Ewer v. Ambrose .. 204 *d*
—— v. Atkinson .. [339 *f*]
Exeter, Corp. of, —— v. .. 170 *k*
—— M. of, v. Warren [310 *b*]
Eyles v. Ward [180 *b*, 181 *c*, 493 *b*]
Eyre v. Dolphin 3, 8, 9 *a*, [22 *e*]
—— v. Palsgrave .. 169 *b*

F.

Page
Fachina v. Sabine .. [65 *f*]
Fagan v. Dawson .. [164 *e*]
Fairlie v. Hastings .. 465 *c*
Fairly v. Stafford .. [516 *a*]
Falmouth, Lord, v. George 368 *d*
Faro v. Hicks .. 234 *d*
Farquharson v. Balfour [30 *d* and *i*], 32 *a*, 211 *b*
Farrar's case .. 484 *d*
Farrar v. Hutchinson [176 *c*, 187 *d*, 288 *d*]
Farrer v. Hutchinson [21 *d*, 34 *b*, 39 *e*]
Farrell v. —— .. [27 *a*]
Faulkner v. Daniel [149 *c*, 419 *d*]
—— v. Elger .. 281 *c*
Fauquier v. Tynte .. 119 *e*
Fawkner v. Watts .. [315 *a*]
Fay v. Prentice .. [396 *b*]
Feaks, *In re* .. [83 *k*]
Fector v. Beacon .. [439 *b*]
Fencott v. Clarke .. 192 *e*
Fenton v. Hughes . 14 *c*, 369 *d*
Fenwick v. Jones .. 525 *e*
—— v. Read .. [185 *c*]
—— v. Reed .. 31 *e*, 187 *a*
Fereday v. Wightwick .. 339 *a*
Ferrers, Lord, v. Shirley 264 *f*, 265 *e*
Ferry v. Fisher .. 198 *e*, 220 *k*
Field v. Sowle 89 *e* and *f*, [390 *a*]
Fielder v. Cage .. [11 *e*]
—— v. Winchester, Bp. of [258 *g*]
Filkin v. Hall .. 27 *b*
—— v. Hill .. 231 *c*, 492 *c*
Filmer v. Gott .. 288 *d*
Finch v. Besbridger [390 *a*, 474 *d*]
—— v. Finch .. 81 *d*
—— v. Messing [311 *f*, 312 *d*]
Firkins v. Lowe .. 34 *b*
Firthir v. Edwards .. [273 *d*]
Fish v. Mountford . [496 *a*]
Fisher v. Graves .. [312 *e*]
—— v. Hitchingman 160 *f*, 162 *a*
—— v. Ogle .. 445 *f*
Fitz v. Rabbitts .. [269 *f*]
Fitzgerald, —— v. .. 357 *d*
—— v. Fauconberge, Lord [278 *a*], 452 *a*
—— v. Fitzgerald [456 *b*]
—— v. Flaherty [27 *a*, 146 *c*, 230 *a*, 231 *a*]
Fitzhugh v. Lee .. 122 *c*
Fitzpatrick v. Webb .. [143 *b*]
Fitzwalter Peerage Case [186 *f*, 267 *b*, 268 *a*, 269 *f*, 272 *a*, 319 *a*]
Fladong v. Winter .. 512 *e*, 539 *f*
Fleet Market Improvement Act, *In re* [545 *d*]

Page

Fleming, Doe d., v. Fleming 308 *d*
——— v. St. John .. 83 *g*
Fletcher v. Glegg [525 *f*, 526 *a*]
——— v. Manning .. [390 *a*]
Flicks v. Shells .. [490 *a*]
Flight v. Jones .. [136 *a*]
——— v. Robinson .. [383 *a*]
Flinn v. Calow . [278 *a*]
Flint v. Watson .. 156 *b*, 190 *a*
Flood v. Finlay .. [291 *d*]
Flowerdale v. Collett [71 *b*], 221 *b*
Floyd v. Powis .. 357 *e*
Fluding v. Winter .. [474 *f*]
Foderingham v. Wilson .. 115 *d*
Foote v. Haynes .. 380 *g*
Footner v. Figes .. 528 *d*
Force and Hembling's case 301 *a*
Ford v. Compton .. [391 *b*]
—— v. Grey .. 428 *f*, 462 *b*
—— v. Yates .. [278 *a*]
Fordyce v. Willis .. [293 *c*]
Forrester v. Helme .. [192 *c*]
——— v. Pigou .. 358 *b*
Fortescue —— v. .. [108 *c*]
Forty v. Imber .. 242 *a*
Foster v. Lisson .. 235 *f*
——— v. Porter . [275 *c*]
——— v. Sisson .. 306 *a*
——— v. Williams .. 359 *a*
Fotherby v. Pate 340 *a*, 356 *f*, 357 *e*
Fotheringham v. Greenwood 350 *f*
Fowler v. Welford .. 375 *a*
Fox, *Ex parte* .. 146 *a*, 455 *c*
—— v. Marster .. [278 *b*]
Foxlow v. Amcoats .. [490 *a*]
Frances, Doe d., v. Jesson 488 *b*
Franco v. Bolton . 85 *i*
Frankland v. Frankland .. 89 *a*
Franklin's case .. 401 *c*
Franklin v. Segerbrath .. [478 *b*]
——— v. Shilling .. [313 *c*]
Franklyn v. Colquhon .. 64 *b*
——— v. Colquhoun [338 *g*]
Franks v. Carey .. [313 *a*]
——— v. Mainwaring .. [524 *a*]
Fraser v. Birch .. [464 *b*]
Frederick v. Aynscombe 115 *c*
Freeland, Doe d. v. Burt 283 *b*
Freeman v. Arkell .. 270 *a* and *b*
———, *Ex parte* .. [354 *e*]
——— v. Fairlie .. [19 *a*]
——— v. Phillipps 260 *f*, 261 *e*
Freemantle v. Bankes [294 *b*], 297 *e*
French v. Barron .. 179 *e*
——— v. French .. [390 *a*]
——— v. Lewsan .. [137 *b*]
Frere v. Green 123 *b*, [131 *a*]

Page

Freshfield v. Read' .. [174 *a*]
Fricker v. Moore [101 *a*, 220 *e*]
Frisby v. Stafford .. [510 *b*]
Fritchley v. Williamson [313 *d*]
Fry v. Wood .. 258 *g*
Fulconer v. Hunson .. 252 *c*
Fuller v. Fotch .. 435 *k*
Furneaux v. Hutchins .. 236 *c*
Fursdon v. Clogy .. [310 *b*, *bis*]
Further v. Sanger .. [350 *a*]
Furwis v. White .. [158 *b*]

G.

Gabbett v. Cavendish .. 32 *a*
Gage v. Hunter 197 *b*, 495 *a*
Gainsborough v. Gainsborough [282 *c*]
Gainsford v. Grammar 48 *c*, 384 *f*
Gait v. Osbaldeston .. 85 *g*
Galbraith v. Neville 425 *d*, 446 *e* and *g*
Gale v. Croft .. [282 *c*]
Galway v. Baker .. [33 *b*]
Gape v. Handley .. 281 *d*
Gardiner v. Mason 30 *l*, [139 *d*]
Gardner v. Dangerfield .. [43 *c*]
——— Peerage case .. 421 *e*
——— v. Rowe .. 526 *a*
Gargrave v. —— .. [258 *g*]
Garland v. Schoones .. 162 *c*
——— v. Scott .. 41 *a*
Garnons v. Barnard 305 *a*, [308 *c*]
Garrells v. Alexander .. 265 *c*
Gascoigne v. Thwing [288 *f*, 292 *b*]
Gascoygne's case .. 494 *a*
Gason v. Granger .. 221 *b*
——— v. Wordsworth 92 *b*, 118 *f*, 143 *b*, 220 *d*, 252 *a*
Gasson or Gason v. Wordsworth [124 *g*]
Gazelle v. Hurst .. [470 *a*]
George v. Evans .. [42 *b*, 45 *g*]
——— v. Howard [313 *d*, 315 *a*]
——— v. Surrey .. 267 *c*
——— v. Thompson .. [273 *d*]
Gerard v. Penswick .. 143 *d*
Gery v. Hopkins . 171 *f*
Gibbons v. Caunt .. 302 *e*
——— v. Gaunt .. [301]
——— v. Cross .. 302 *e*
——— v. Powell .. [273 *d*]
Gibbs v. Payne .. 503 *b*, 512 *a*
—— v. Phillipson .. 64 *b*
Gibson v. Albert .. [340 *a*]
——— v. Russel .. [288 *d*]
——— v. Whitehead .. 178 *e*

Page
Gilbert v. Wetherell .. 516 *c*
Giles v. Smith .. [271 *a*]
Gill v. Watson 205 *a*, 208 *c* and *k*
Gillard v. Bates .. [381 *a*]
Gilpin v. Southampton, Lady 10 *g*
Gladding v. Yapp .. [294 *c*]
Glassington v. Thwaites .. 26 *f*
Glegg v. Legh .. 39 *e*, 85 *a*
Glendinning, *Ex parte* [278 *a*]
Glover v. Faulkner .. [338 *d*]
Glubb v. Edwards [251 *g*, 263 *e*, 264 *f*]
Glyn v. Bank of England 227 *e*, 314 *f*, 366 *f*
Glynn v. Bank of England [4 *a*, 4 *b*, 311 *f*]
—— v. Soares .. 21 *d*
Goblet v. Beachey .. [280 *c*]
Goddard's case .. 288 *g*
Godie, *In re* .. [80 *e*, 353 *c*]
Gomme v. West .. [519 *c*]
Gold v. Canham .. 446 *c*
Goldie v. Shuttleworth .. 48 *a*
Goman v. Salisbury .. 290 *a*
Gompertz v. Best .. [245 *e*]
Goodenough v. Alway 259 *b*, 260 *b*
Goodhay v. Henry .. 354 *c*
Goodier v. Lake .. 272 *e*
Goodinge v. Goodinge [282 *c*, 284 *a*]
Goodman v. Sayers .. 235 *a*
Goodtitle v. Otway .. 302 *c*
Goodwin v. Gresler .. [493 *b*]
Gooldiff v. Fuller .. [31 *a*]
Gordon v. Gordon [101 *a*, 213 *d*], 220 *e*, 232 *d*, [318 *c*], 527 *a*, [527 *c*]
—— v. Hertford .. [291 *d*]
—— v. Secretan 45 *c*, 173 *a*
Goss v. Watlington .. 309 *h*
—— v. Tracey [263 *e*, 366 *b*, 367 *b*, 526 *e*]
Gosse v. Tracey .. 366 *e*
Gould v. O'Keefe .. [340 e]
Gover v. Lucas .. [60 *c*]
Gower v. Baltinglass .. 211 *a*
Grace v. Stafford, Lady .. 116 *b*
Graham's case .. [307 *e*]
Graham v. Oliver .. [27 *a*]
Grant v. Grant [334 *a*, 464 *b*, 468 *c*]
Granville, Lady, v. Ramsden 422 *a*
—— Lord, v. Beaufort, Dss. [294 *c*]
Grave v. Cooper .. [30 *k*]
—— v. Salisbury, Lord 299 *d*
Graves v. Budgell 53 *c*, 191 *c*, 495 *f*
—— v. Hughes .. [282 *c*]
Gray v. Altham .. 302 *g*
Grayson v. Wilkinson [176 *a*], 178 *c*, 181 *a*

Page
Green v. Gatewick 252 *c*, 304 *e*
—— v. Green .. [142 *g*]
—— v. Pledger .. [428 *g*]
—— v. Proud .. 410 *a*
—— v. New River Company 362 *e* 368 *f*, 433 *b*
—— v. Weaver .. 81 *d*
Greenaway v. Adams .. 200 *b*
Greenhough v. Gaskell .. 39 *g*, 41, [80 *k*, 380 *e*], 382 *e*
Greenhouse, *Ex parte* .. [511 *e*]
Greenlaw v. King .. [42 *b*]
Greenwood v. Parsons .. 197 *c*
Gregg v. Taylor .. 342 *g*
Greswolde v. Kemp .. [405 *f*]
Greville v. Chapman .. [351 *a*]
Griells v. Gansell .. 105 *d*, *bis*
Griffin v. Archer .. [354 *a*]
—— Doe d. v. Mason 482 *d*
Griffiths v. Ivory .. [266 *g*]
Grinnell v. Cobbold .. 115 *b*
Groom, *Ex parte*, *re* Chambers [344 *a*]
Groyner v. Gale .. [339 *d*]
Grubb v. Grubb .. [107 *b*]
Grylls, *Ex parte* .. [522 *a*]
Guiscard's case .. 398 *g*
Gurney v. Hibbert .. [254 *f*, 542 *c*]
—— v. Longlands .. 266 *b*
Guy v. Sharp .. 297 *b*
Gwilliam v. Hardy .. 412 *a*
Gwyn, *Ex parte* .. [354 *e*]
Gwynn v. Petty .. [338 *b*]
Gyles v. Hill .. 148 *e*
—— v. Wilcox .. 454 *b*

H.

Haddow v. Parry .. 309 *h*
Hadow v. Barnett [221 *d*], 307 *a*
Hagedorn v. Reid .. 314 *b*
Hairby v. Emmett .. [518 *a*]
Haldane, Doe d. v. Harvey 172 *g*
Hale v. Stewart .. [42 *a*]
Hales v. Pomfret .. [10 *c*, 427 *e*]
Hall v. Bainbridge .. [31 *a*]
—— v. Cazenove .. 288 *g*
—— v. Clee .. [510 *a*]
—— v. De Tastet .. 89 *c*, 91 *f*
—— v. Farmer .. [312 *e*]
—— v. Hall .. [282 *c*]
—— v. Maltby .. 232 *d*
—— v. Warren .. [331 *d*]
Hallett v. Cousins .. [204 *d*]
Halls v. Warren [233 *b*, 390 *a*]
Hamilton, Duke of, v. —— 143 *b*, 256 *e*

Page

Hamilton, Duke of, v. Meynall [143 *b*]
Hammond v. —— [141 *a*] 222 *b*,
—— v. Shelley .. [5 *b*]
Hamond v. Wordsworth [118 *c*]
Hampshire v. Pierce .. [286 *b*]
Hand v. Hand .. 366 *e*
Handeside v. Browne [10 *c*, 427 *e*]
Handley v. Billinge .. 510 *a*
Hankins v. Middlleditch .. 121 *k*
Hannington, The William [242 *c*, 243 *b*]
Hanover, King of, v. Wheatley [70 *a*, 106 *e*, 118 *d*]
Hardman v. Ellames .. 33 *b*
Hardy's case .. 377 *d*
Hare v. Hare .. [181 *a*, 265 *a*]
—— v. Shearwood [291 *c*, and *d*]
—— v. Sheerwood .. 278 *a*
Hareforth v. Gates .. [219 *g*]
Harman v. Spottiswood .. 531 *c*
Harpur v. Brook .. 310 *b*
Harrington v. Fry .. 265 *g*
Harris v. Bodenham .. 192 *g*
—— v. Cottrell .. 145 *c*
—— v. Ingledew 189 *f*, [190 *b*, 182 *a*]
—— v. Mantle .. 237 *e*
Harrison v. Bornell .. 159 *f*
—— v. Blades .. 251 *a*
—— v. Corbould .. [138 *c*]
—— v. Courtald .. 370 *e*
—— v. Elvin .. [186 *c*]
—— v. Southcote 1 *b*, 83 *b*
—— v. Weale .. [186 *c*]
—— v. Williams .. 171 *c*
—— v. Wright .. [461 *b*]
Harriss v. Lincoln, Bp. of, [284 *a*]
Hart v. Durand .. [284 *b*]
—— v. Harrison .. [161 *c*]
—— v. Hart [272 *e*, 391 *b*, 269 *f*, 272 *c*, 490 *a*]
—— v. Stevens .. [342 *f*]
—— v. Strong .. 115 *a*
Hartford v. Lee .. [378 *c*]
Hartopp v. Hartopp 297 *e*, [287 *b*, 288 *b*, 298 *a*]
Harvey v. Tebbutt .. [338 *g*]
Harwood v. Sims 305 *d*, [307 *a*]
—— v. Tooke .. 27 *b*
—— v. Wallis .. 289 *b*]
Hatch v. —— .. 518 *b*, and *d*
Hatcham v. Winchcombe [135 *b*]
Hatfield v. Hatfield .. 441 *e*
Hauber Giertzen, case of .. [4 *a*]
Hawes v. Bamford . [540 *a*]
—— v. Hand .. [366 *b*]

Page

Hawes v. Mitchell .. [274 *a*]
Hawkesworth v. Dewsnap [274 *a*]
Hawkins v. Croke .. 211 *a*
—— v. Hawkins .. [490 *a*]
—— v. Luscombe .. 28 *d*
Haworth v. Bostock .. [428 *g*]
Hayward v. Colley .. [106 *f*]
Head v. Head .. 357 *c*, 475 *e*
Healey v. Thatcher .. [187 *c*]
Hearing v. Fisher .. [135 *b*]
Hearne v. James .. [391 *b*]
Heath v. Hall .. [353 *c*]
——, *Re* .. [83 *k*]
Hedges v. Cardonnell 521 *d*, 537 *b*
Heeley v. Jagger .. [141 *a*]
Helmsley v. Loader .. 178 *b*
Hemegal v. Evance .. 176 *b*
Hempton v. Cross . 413 *g*, 414 *g*
Hendebowrak v. Langley 358 *c*
Henkle v. Royal Exchange Assurance Co. .. 289 *c*
Henley v. Philipps .. [174 *b*]
Henriques v. Henriques .. 189 *i*
Henry v. Adey .. 154 *f*, 159 *c*
Henshaw v. Pleasance .. 435 *k*
Henson v. Cooper .. [278 *a*]
Herbert v. Ashbourne .. 170 *d*
—— v. Herbert [53 *e*, 74 *c*, 124 *g*, 191 *d*]
—— v. Mayn 79 *d*, [121 *f*]
—— v. Reid .. [282 *c*]
—— v. Tuckall .. 320 *b*
—— v. Westminster, Dean and Chapter of .. 35 *a*
Hereford, Bp. of, v. Cooper 261 *d*
Herne v. Mackenzie .. [67 *e*]
Herring v. Clobury [39 *g*, 80 *h*]
—— v. Whittam .. [282 *c*]
Herthwaite v. Powell .. [488 *a*]
Heslop v. Bank of E. .. [46 *e*]
Hewatson v. Tookey .. 339 *c*
Hewattson v. Tookey .. [340 *a*]
Hewes v. Hewes .. [518 *c*]
Hewson v. Brown .. 412 *a*
—— v. Hewson .. [503 *e*]
—— v. Reed .. [282 *c*]
Hibben v. Calemburg .. [124 *g*]
Hickson v. Aylward .. [468 *b*]
Hiern v. Mill .. [277 *a*]
Higgins v. Mills .. 536 *g*, 537 *b*
Higginson v. Clowes .. [287 *a*]
Higgs v. Taylor .. [67 *e*]
High v. Mountford .. [106 *c*]
Higham v. Ridgway 309 *a*, and *k*, 320 *b*
Hilberson v. Cambridge .. 117 *f*
Hildersley v. Devischer .. 80 *e*

Page

Hiliard v. Phaley 29 *f*, 424 *e*, 430 *c*, 442 *b*
Hill v. Adams .. 29 *b*, [506 *b*]
—— v. Binney .. 460 *c*
—— v. Unett .. [176 *e*]
Hillary v. Waller .. 487 *d*
Hinchliffe v. Hinchliffe .. 298 *c*
Hincliffe v. Hincliffe .. [282 *c*]
Hincksman v. Smith .. [390 *a*]
Hind v. Head .. [342 *f*]
Hindley v. Billinge .. [145 *g*]
Hirst v. Pierce .. 20 *c*
Hoare v. Coryton .. 310 *a*
——— v. Johnstone .. [512 *f*]
Hobbs v. Norton .. 14 *b*
Hobhouse v. Hamilton .. 418 *b*, [419 *c*]
Hobson v. Sherwood [46 *c*, 510 *b*]
Hockley v. Butler .. [339 *d*]
Hodges' case .. [472 *a*]
Hodgson v. Butterfield .. 25 *a*
——— v. Dean .. 241 *b*
——— v. Hancock .. 289 *f*
——— v. Hitch . [286 *b*]
——— v. Merest 28 *e*, [428 *d*]
——— v. Thornton .. 231 *a*
——— v. Warden .. [38 *a*]
Hodle v. Healey .. 462 *c*
Hodsden, Doe d., v. Staple 476 *f*
Hodson v. Earl of Warrington, 35 *b*, 192 *d*
Hoe v. Nelthorpe .. 414 *e*
Hogan, *In re*, .. 542 *a*
Hoile v. Scales .. [334 *a*]
Holcroft v. Smith .. 366 *d*, 417 *b*
——— Ly., v. Smith [153 *a*, 269 *f*, 256 *b*, 526 *e*
Holden v. Hearn [27 *a*, 50 *b*, 232 *b*, and *e*]
Holdsworth v. Dartmouth, Mayor of, [209 *d*]
Holland's case .. [405 *d*]
Holland v. Clark .. [460 *c*]
——— v. Reeves .. [273 *d*]
Holles v. Carr .. 495 *b*
Hollis v. Goldfinch .. 236 *e*
Holloway v. Clarke .. 302 *i*
Holman v. Exton .. 483 *a*
Holmes v. Arundel, Corporation of, [506 *b*]
——— v. Baddeley .. [42 *a*]
——— v. Hyde .. [202 *a*]
Holt v. Miers .. [273 *d*, 434 *d*]
Holtscombe v. Rivers .. [6 *a*]
Home v. Bentinck .. 87 *a*
Honeywood v. Peacock .. 369 *b*
——— v. Selwin .. 81 *d*

Page

Hood v. Beauchamp .. [319 *f*]
—— v. Pim 106 *b*, 180 *b*, 189 *c*, 202 *d*, 219 *d*, and *e*
Hook v. Dorman .. 539 *c*
Hooley v. Hatton [294 *b*, 390 *a*]
Hope v. Hope .. [121 *h*, 123 *c*]
Hopkinson v. Bagster .. [515 *h*]
——— v. Roe [507 *d*, 512 *c*]
Hornby v. Pemberton .. 24 *d*
Horne v. Mackenzie .. [341 *a*]
Horsey v. Horsey .. 218 *e*
Horton v. Whitaker .. 531 *d*
Hosier v. Hart .. 221 *h*
Hough v. Williams .. [504 *d*]
Hougham v. Sandys .. [338 *g*]
Houlditch v. Donnegal, M. of, [27 *a*, 196 *c*, 456 *b*]
Houston v. Hughes .. 531 *i*
Hovill v. Stephenson 251 *f*, 355 *f*, 372 *a*
Howard v. Braithwaite 386 *c*, 525 *f*
——— v. Brown .. 468 *a*
——— v. Smith .. [277 *b*]
——— v. Tremaine 257 *b*, [257 *f*]
Howell v. George .. [11 *d*]
Huddleston v. Briscoe 151 *d*, 274 *b*
Huddlestone v. Brisco .. [391 *b*]
Hudson v. Kersey .. 181 *e*
——— v. Robinson .. 360 *c*
Huet v. Le Mesurier .. 168 *c*
Hughes v. Biddulph .. 41 *a*
——— v. Budd .. [273 *d*]
——— v. Cornelius .. 445 *g*
——— v. Garner .. [5 *a*, 233 *a*]
——— v. Garnons [42 *a*, 389 *b*]
——— v. Rogers .. [266 *g*]
Hull, Mayor of, v. Horner .. 476 *c*, 485 *a*
Human v. Pettett .. 309 *c*
Humble v. Malbe .. [76 *b*]
Hume v. Burton [444 *a*, 487 *b*]
Humphrey's case .. [354 *a*]
——— v. Ingleton .. [442 *c*]
——— v. Pensam [259 *e*]
Hungate v. Fothergill .. [339 *e*]
Hunt v. Beach .. [4 *a*]
—— v. Hort .. [277 *a*, 279 *e*]
—— v. Priest .. 519 *c*
Huntcliff v. Cole .. [466 *d*]
Hunter v. Atkins .. [390 *a*]
——— v. Gibson .. 235 *a*
——— v. Capron .. [31 *d*]
Huntingdon Peerage case [267 *c*, 316 *g*, 317 *b*]
Huntingtower, Ld., case of [498 *a*]
Huntly Peerage .. [410 *e*]
Hurd v. Partington .. [338 *g*]

Page
Hurst v. Beach 294 *c*, 297 *b*, [294 *b*, 357 *e*]
Hutcheson v. Mannington 254 *f*
Hutchins v. Lee [277 *a*, 290 *a*]
Huthinson v. Pepys .. [141 *a*]
Hutton v. Sandys .. [340 *d*]
Hyde v. Whitfield .. 542 *b*
Hylton v. Morgan .. 32 *c*

I.

Ibbetson v. Rhodes 227 *d*, and *e*
Ilchester, Earl of, *Ex parte* 302 *g*
Ilderten v. Atkinson 362 *a*, 365 *d*
——— v. Ilderton .. 254 *a*
Illingworth v. Leigh 163 *e*, 312 *c*
Inglet v. Inglet .. [203 *e*]
Ingram v. Mitchell [69 *d*, 105 *d*]
——— v. Wyatt [52 *e*, 72 *d*, 191 *d*, 194 *a*]
Inman v. Whitley .. [38 *b*]
Irish v. Rooke .. 218 *c*
Irnham, Ld., v. Child 278 *a*, 290 *a*
Irving v. Viana 26 *a*, and *e*, [110 *f*, 120 *c*, 224 *b*]
Irwin, Ld., v. Simpson .. 165 *a*
——— v. Simpson [158 *b*, 163 *e*, 311 *b*]
Ivat v. Finch .. 309 *e*
Ivy, Lady, and Neale's case 398 *e*

J.

Jackson, *Ex parte* .. [505 *e*]
——— v. Benson [79 *a*, 79 *b*, 79 *c*, [179 *d*, 355 *d*]
——— v. Hoflock .. 301 *d*
——— v, Parish .. 197 *a*
——— v. Strong 115 *d*, 117 *a*, [120 *f*]
——— v. Thompson .. [156 *b*]
Jacob v. Hall .. 26 *c*
——— v. Lee .. [273 *d*]
Jacobs v. Leyborn .. [329 *a*]
Jacques v. Edwards . [490 *a*]
James v. Biou .. [247 *a*, 248 *b*]
——— v. Dore .. [519 *c*]
———, *Ex parte* .. 343 *c*
——— v. Newman [121 *f*, 135 *b*]
——— v. Parnell .. [263 *e*]
Janson v. Rany .. 4 *d*
Jarvis v. White .. [526 *e*]
Jauncey v. Sealey [115 *e*, 182 *b*]
Jayne v. Price .. 474 *d*

Page
Jeake v. Westmeath, Marquis of [442 *b*]
Jeans v. Wheedon .. [304 *b*]
Jefferis v. Whittuck 80 *b*, 218 *g*
Jefferson v. Dawson .. 79 *d*
Jenkins v. Pearce .. [173 *f*]
——— v. Quinchant .. 289 *g*
Jenkinson v. Pepys .. [501 *d*]
——— v. Royston .. 423 *b*
Jephson v. Riera .. [535 *a*]
Jerrard v. Saunders .. 85 *d*
Jervis v. Grand Western Canal Co. 436 *c*, 438 *a*
Jervoise v. Duke .. [357 *e*]
——— v. Northumberland, D. of [178 *e*]
Jesson v. Greenaway .. 121 *e*
Jessup v. Duport .. [127 *a*]
Jesus Coll. v. Gibbs .. [275 *c*]
Johnes v. Steitham .. [289 *g*]
Johnson v. Compton .. [492 *a*]
——— v. Hudson .. [270 *f*]
——— Roe d., v. Ireland 485 *c*
——— v. Lawson .. 317 *d*
——— v. Northey .. [537 *e*]
——— v. Smith .. 541 *g*
Johnston v. Carruthers [71 *b*, 223 *e*]
——— v. Johnston .. [302 *e*]
——— v. Todd [317 *a*, 320 *d*, 472 *a*, 495 *d*, 540 *b*]
Jones v. ——— .. 544 *c*
——— v. Brewer .. 125 *b*
——— v. Brooke .. 365 *f*, 385 *d*
——— v. Currey .. [282 *c*]
——— v. Dowthorne .. 111 *e*
——— v. Jones .. [366 *d*, 526 *e*]
——— v. Lewis .. 43 *a*
——— v. Mars .. 178 *b*
——— v. Powell .. 43 *d*
——— v. Price .. [306 *d*]
——— v. Pugh . [39 *g*, 80 *h*]
——— v. Randall 150 *b*, 161 *a*, 424 *b*
——— v. Smith .. [59 *b*, 223 *a*]
——— v. Tarlton .. [149 *b*]
——— v. Thomas [200 *c*, 507 *b*]
——— v. Turberville .. 29 *b*
——— v. Turbarville [340 *f*, 352 *d*]
——— v. Waller .. 312 *d*
——— v. Wiggins .. [20 *c*]
——— v. Yarnold [52 *e*, 191 *d*]
——— v. Yates .. [478 *f*]
Jordaine v. Lashbrooke 385 *d*
Jourdaine v. Lefevre .. 354 *e*
Joynes v. Statham .. 290 *a*
Jupiter Croslie .. [187 *c*]
Jupp, Doe d., v. Andrews 254

K.

Page

Kaye v. Cunningham .. [519 *c*]
Keating v. Keating .. [288 *f*]
Keaton v. Lynch .. [491 *a*]
Keene v. Price .. 520 *d*
Kelly v. French [220 *h*, 221 *i*, *bis.*]
Kelway v. Kelway .. [378 *c*]
Kemble v. Church .. [233 *b*]
Kemeys v. Proctor .. 4 *d*
Kemp v. Mackrell .. 193 *b*, 246 *a*
—— v. King .. [64 *a*]
Kempe v. Wickes .. [334 *a*]
Kempson v. Yorke .. [428 *b*]
Kempton v. Cross .. 413 *g*, 414 *c* and *g*
Kennebal v. Scrafton 302 *e* and *g*
Kennedy v. Kennedy .. [120 *d*]
Kenny v. Dalton .. [106 *a*]
Kensington v. Inglis .. . 270 *b*
————, Lord, v. Pugh [203 *e*]
———— v. White [112 *c*, 114 *g*, 117 *d* and *i*]
Kent v. Benham .. [339 *b*]
—— v. Burgess .. [490 *a*]
—— v. Strong .. 118 *a*
Keogh v. Pentland .. [61 *d*]
Keymer v. Perring .. [70 *b*]
Kidney v. Cockburn .. 320 *b*
Kilbee v. Sneyd [6 *a*, 10 *c*, 247 *b*, 390 *a*, 427 *e*, 521 *d*]
Kilby v. Stanton .. [541 *g*]
Kimpton v. Eve .. [479 *b*]
Kindersley v. Chase 445 *a* and *d*
King v. Allen .. 117 *c*, [114 *g*]
—— v. Baddeley .. 285 *b*
—— v. Burr .. 85 *i*
Kingdome v. Boakes .. 4 *b*
Kingscote v. Barnsley .. [18 *c*]
Kingston, case of Duchess of 50 *a*, 258 *c*, 381 *b*, 382 *a*, 424 *d*, 431 *a*, 440 *b*, 444 *a*, 447 *g*
Kinnersley v. Orpe .. 419 *b*
Kinsey v. Kinsey .. 422 *b*
Kinsman v. Croke .. 251 *b*
Kirby v. Potter .. [282 *c*]
Kirk v. Eddowes .. [297 *b*, 298 *g*]
—— v. Kirk 198 *c*, [69 *b*], 106 *a*
Kirkland v. Smith .. [208 *i*]
Kirkpatrick v. Love .. [515 *e*]
Knebel v. White .. [240 *e*]
Knight v. Knight .. [197 *d*]
——— v. Pechy [288 *f*, 292 *b*]
——— v. Waterford, M. of [39 *c*, 40 *d*, 273 *d*, 310 *b*]
Kynaston v. East India Co. [62 *a*]

L.

Page

Labrey, *Ex parte* .. [544 *b*]
Lade v. Olford .. 476 *d*
Lagarvity v. Atty. Gen. .. 116 *e*
Laing v. Raine .. 49 *a*
Lake v. Cansfield .. 178 *d*
—— v. Lake .. [282 *c*, 294 *b*]
—— v. Skinner 188 *e*, 189 *h* and *i*, [312 *e*], 497 *a*
Lambert v. Lambert .. [339 *b*]
———— v. Rogers .. 31 *f*
Lamont v. Crook .. [102 *c*]
Lamplugh v. Lamplugh .. [292 *b*]
Lampon v. Corke .. 276 *e*
Lancashire, Doe d., v. Lancashire 302 *b* and *e*
Lancaster v. Lancaster [117 *e*, 133 *b*]
Lancum v. Lovell [364 *a*, 368 *d*]
Langley v. Brown .. 289 *b*
——— v. Fisher [39 *g*, 50 *b*, 78 *c*, 80 *i*, 138 *c*, 289 *c*, 342 *f*, *bis.* 439 *c*]
——— v. Fisher (on Appeal) [229 *a*, 308 *f*, 345 *b* and *d*, 378 *a*]
Laragoity v. Atty. Gen. .. [114 *g*, 115 *g*, 116 *e*]
Larbalestier v. Clarke . 363 *b*
Lavender, *Ex parte* .. [537 *c*]
Law v. Hunter 240 *c*, [503 *d*, 508 *b*, 533 *c*]
Lawes v. Reed .. [341 *a*]
Lawrell v. Titchborne .. [139 *c*]
Lawrence v. Sharpe .. [189 *i*]
———— v. Thatcher .. [464 *c*]
Lawson v. Wright .. 241 *a*
Lawtor v. Sweeney .. [478 *b*]
Lea v. Band .. [338 *b*]
—— v. Read .. [81 *a*]
Leach v. Leach [167 *f*, 250 *a* and *b*]
——— v. Simpson .. [262 *d*]
Leadbitter —— v. .. 454 *b*
Leake v. Westmeath, M. of [161 *c*]
Learmouth, *Ex parte* .. 528 *a*
Lea's case, Henry .. 254 *g*
Leather v. Newitt [167 *d*, 312 *e*]
Leburn v. Crisp .. [422 *c*]
Lechmere v. Brasier .. 182 *b*
Lee v. Atkinson .. 338 *d*, [338 *g*]
—— v. Read .. [50 *l*]
—— v. Shore .. [490 *a*]
Leebine v. Green .. [504 *c*]
Leeman v. Whiteley .. [292 *b*]
Lefebure v. Warden .. [310 *b*, *bis.*]
Legal v. Miller .. 290 *a*
Legard v. Sheffield .. 22 *c*, 51 *d*
Legatt v. Tollervey .. 169 *f*

Page

Legh v. Haverfield .. 243 *b*
Leigh v. Maudsley .. [233 *a*]
—— Peerage case .. 398 *f*
—— v. Ward .. [10 *b*]
Leman v. Whiteley .. [278 *a*]
Le Neve v. Le Neve 4 *d*, 28 *g*, [28 *e*]
Lennox v. Minnings .. 220 *f*
Lenox v. Clifton .. [203 *e*]
Le Niernen Dupotet .. [445 *k*]
Leonard v. Franklin .. [312 *e*]
Le Texier v. Anspach, Margravine of 345 *b*
Leving v. Caverley [10 *b*, 428 *d*]
Levy v. Wilson .. 178 *b*
Lewis v. Armstrong .. [529 *a*]
—— v. Clarges .. 424 *a*
—— v. Marshall .. [280 *f*]
—— v. Morgan .. [6 *a*, 512 *f*]
—— v. Owen .. [70 *a*, 106 *f*]
Leyfield's case .. 452 *b*
——, Dr., case of .. [173 *f*]
Lincoln v. Wright [22 *a*, 58 *b*, 223 *a*]
Lindsay v. Lynch [4 *d*], 28 *a*, 243 *d*, [291 *e*]
Lingen v. Simpson .. 31 *c*
List's case .. 64 *b*
Litchfield, Earl of, v. Bond [24 *d*]
Litchfield v. Mouchett .. [282 *c*]
Llewellyn v. Badeley .. [34 *a*]
—— v. Mackworth .. [6 *a*]
Lloyd v. Donisthorne .. 258 *d*
—— v. Harvey .. 300 *c*, [282 *c*]
—— v. Makeam .. 339 *f*
—— v. Passingham 83 *j*, 168 *b*
—— v. Trimleston, Lord [390 *a*, 537 *d*]
—— v. Wait .. [309 *g*, 315 *b*]
—— v. Wooddall .. 253 *c*
Lock v. Denner .. [204 *c*]
Locke v. Foote .. 180 *a*
Lockhard v. Hardy .. [492 *a*]
Lodge v. Manby .. 534 *d*
London, Bishop of, v. Fytche 83 *d*
—— City of, v. Dorset, Earl of, [196 *b*, 203 *e*]
—— v. Perkins 261 *e*, [526 *d*]
—— v. The Water Bailiff 355 *b*
—— v. Thompson 30 *l*
—— and York Railway Co. v. Price .. [157 *a*]
Long v. Champion .. 429 *b*
—— v. Hitchcock .. [204 *d*]
Longford v. Eyre .. 180 *c*
Longley v. Brown .. 289 *b*
Longman v. Tyson .. [544 *b*]

Page

Lonsdale v. Heaton [305 *c*]
Lopdell v. Creagh .. 535 *a*
Lopez v. Deacon .. [30 *a*, 42 *a*]
Lord, *Ex parte* .. 495 *e*, [333 *f*]
Lorton, Viscount, v. Kingston, Lord [422 *c*]
Lothian v. Henderson .. 445 *b*
Loughman v. Novies .. 119 *c*
Lousada v. Templer 18 *e*, [112 *d*], 113 *c*
Loveden v. Milford .. 220 *a*
—— v. Millford .. [124 *g*]
Lovelace's case, Lord 177 *c*
Lovell v. Yates .. [526 *c*]
Lowe v. Firkins .. [139 *d*]
—— v. Joliffe .. 386 *a*
—— v. Huntingtower, Lord [287 *a*]
Lowley, *Ex parte*, and *re* [354 *e*]
Lowther v. Raw .. 235 *i*
—— v. Whorwood .. 117 *d*
Lubiere v. Genou .. 195 *b*
Lucas, *Ex parte* .. [533 *c*, 544 *c*]
Ludford v. Gretton .. 408 *c*
Ludlow, Corp. of, v. Charlton [167 *e*, 186 *f*]
Lugg v. Lugg .. 301 *b*
Lumbrozo v. White .. 540 *e*
Lupton v. White 6 *a*, [328 *a*, 368 *g*, 504 *b*]
Luttrell v. Reynell .. 209 *c*, 250 *d*
Lydeker v. Power .. [121 *g*]
Lyford v. Coward .. 482 *a*
Lygon v. Strutt .. [169 *c*]
Lyne v. Abley .. [521 *a*]
Lynn v. Beaver .. [294 *c*]
—— v. Buck .. 518 *b*
—— v. Lockwood .. [274 *a*]
—— Mayor of, v. Denton 171 *b*
Lyon v. Reed .. [485 *b*]
Lysaght v. Lysaght .. [219 *b*]

M.

Mabank v. Brooks .. [282 *c*]
—— v. Metcalfe 340 *a*, 357 *e*
Maber v. Hobbs [51 *c*, 61 *d*, 172 *f*, 189 *g*]
Macauley v. Shackell .. [114 *g*]
Macbeath v. Haldimand 282 *c*
Mac Braine v. Fortune .. 362 *a*
Mc Cabe v. Hussey, or Maccabo v. Hughes .. [533 *c*, 536 *a*]
Mc Combie v. Newton .. [126 *a*]
Mac Dougal v. Elliot .. 500 *a*
—— v. Young .. 165 *e*
Mc Gahay v. Alston .. [269 *f*]

Page

Mc Gregor v. Topham .. [529 *a*]
Mc Intosh v. Gt. Western Railw. Co. [93 *a*, 121 *g*, 124 *e*]
——— v. Marshall .. [172 *b*]
Mac Iver v. Humble .. 352 *c*
Mc Kenna v. Everitt .. [121 *f*]
Mac Kenire v. Fraser .. 186 *c*
Mc Kensie v. Fraser .. [181 *a*]
——— v. Powis .. [519 *c*]
Mac Queen v. Farquhar .. 178 *a*
Macklow v. Wilmot .. [501 *b*]
Mac Naghten's case .. [470 *a*]
Mackworth v. Pearson .. [208 *f*]
Maesters v. Abram .. 465 *b*
Magrath v. Veitch .. [259 *e*]
Magrave v. White .. 439 *b*
Malcolm v. Scott [27 *a*, 230 *a*, 231 *a*]
Malkin, *Ex parte* .. 353 *c*
Malone v. Morris [205 *e*, 208 *i*, 219 *b*]
Maloney v. Bartley .. 82 *a*
Man v. Cary .. 166 *c*
—— v. Ricketts [184 *d*, 186 *b*, 282 *c*]
—— v Ward [4 *a*], 6 *a*, [328 *a*, 340 *a*, 356 *e*, 368 *g*]
Manby v. Curtis .. 313 *b*
——— v. Lodge .. 245 *b*
Manchester v. Macleod .. [457 *a*]
Manlye v. Simcote .. [496 *a*]
Manning v. Lechmere [4 *a*], 310 *b*, 311 *b*, 311 *d*
Manson v. Burton .. [200 *c*, 507 *b*]
Marbury v. Smith .. [88 *c* and *f*]
March v. Collnett .. 166 *c*
Margareson v. Saxton .. 498 *e*
Margrave v. White .. 439 *b*
Markham v. Smyth .. [312 *e*]
Marks v. Lahee .. [309 *a*]
Marryatt v. Noble .. [115 *d*]
Marriott v. Marriott .. 414 *c*
Marsdon v. Bound .. 257 *b*
——— v. Stanfield .. [336 *d*]
Marsfield v. Weston .. 364 *b*
Marsh v. Sibbald .. 31, 32 *d*, 37 *e*
——— v. Walker .. 495 *b*
Marshall v. Cliffe .. 49 *b*
Martin v. Nicolls .. 446 *b*, [114 *g*]
——— v. Willis .. [519 *c*]
Masden v. Bound .. 124 *b*
Mascall v. Mascall .. [300 *d*]
Mascarenas v. Dacoran .. [261 *e*]
Mason v. Hayter .. [200 *c*]
——— v. Mason .. 487 *d*
Masters v. Drayton .. 354 *c*
——— v. Masters .. 295 *a*
Matchless Vint. .. [457 *a*]
Mathew v. Hanbury .. 233 *f*
Matthews v. Haydon .. 367 *e*

Page

Matthewson v. Stockdale .. 454 *a*
Maule v. Mounsey .. [305 *e*]
Maund v. Allies [30 *k*, 44 *b*, 137 *f*. 501 *a*]
Maude v. Hartley .. [107 *b*]
Mawman v. Tegg .. 455 *a*
Maxwell v. Mayre .. 400 *a*
May v. Taylor .. [464 *a*]
Meadbury v. Isnall .. [338 *c*]
Meade v. Lenthall .. 416 *a*
Meadows v. Duchess of Kingston 430 *e*, 441 *f*
Mears v. Stourton, Lord 498 *e*, 541 *a*, [65 *f*]
Meath, Bishop of, v. Belfield, Lord 276 *e*, 305 *a*, [306 *f*]
——— v. Winchester, Marq. of, .. [312 *b*]
Medcalfe v. Medcalfe .. [427 *e*]
Medlicott v. O'Donel .. 85 *a*
Mee v. Reid .. [65 *f*]
Meeks v. Thelwall .. [203 *e*]
Meinertzhagen v. Davis [490 *a*]
Melville's case, Lord .. 84 *a*
Mendizabel v. Machado 96 *i*, 113 *l*, 114 *d*, 117 *e*
Mentill v. Payne .. 58 *d*
Meredith v. Footner [314 *c*, 315 *a*]
Metcalfe v. Harvey .. [538 *f*]
——— v. Ives .. [10 *c*]
Meymott, *Ex parte* .. 83 *i*
Meyrick v. Wakley .. [310 *b*]
Micklethwaite v. Moore 44 *b*, 44 *c*
Michel v. Webb .. 29 *b*
Michell v. Webb .. [340 *f*]
Middleton v. Janserin .. 448 *a*
——— v. Melton [249 *d*, 310 *b*, 314 *e*, 464 *b*]
——— v. Speright .. [76 *b*]
Mildmay v. Mildmay .. [442 *a*]
Mildrone's case .. [65 *f*]
Mill v. Mill 61 *f*, 205 *e*, [208 *c*, 218 *e*]
Millar v. Craig .. [514 *b*]
Miller v. Falconer .. 362 *d*
—— v. Gow .. [45 *g*, 392 *b*]
—— v. Jackson 242 *e*, [312 *e*]
——, *dem.* Miller, *ten.* [185 *c*]
—— v. Sheppard .. [265 *a*]
—— v. Travers .. 285 *c*
—— v. Wheatley .. 26 *b*
Milligan v. Mitchell .. [44 *b*]
Mills v. Oddy .. [274 *c*, 275 *c*]
—— v. Willbank .. [118 *f*]
Minive v. Row .. [127 *a*]
Minshull v. Lloyd .. [269 *f*]
Mitchell v. Ede .. [187 *c*]

Page

Mitchell v. Rabbetts .. 525 *a*
Mitford v. Peters .. [507 *b*]
Moises v. Thornton .. 154 *e*
Molton v. Harris .. 419 *c*
Monck v. Monck [294 *l*, 297 *c*, 298 *g*]
Monk v. Sibbald .. 457 *d*
Monkton v. Atty. Gen. 319 *c*, 323 *d*, 324 *e*, [317 *a*, 318 *b*, 318 *c*, 529 *a*]
Montague v. Hill .. [428 *f*]
——— ———, Lord, v. Preston, Ld. 416 *c*
Montgomery v. Atty. Gen. [187 *c*]
Montgomerie v. Clark .. 161 *d*
Moodelay v. Martins .. [112 *f*]
Moody v. Leeming .. [138 *c*]
——— v. Steele [112 *d*], 113 *a*, 114 *f*, 117 *b*
——— v. Thurston .. 438 *f*
Moons v. De Bernales .. 199 *c* [390 *a*, 442 *c*]
Moor v. Welch Copper Co. 427 *a*
Moore v. Aylet .. 494 *a*
——— v. Foley .. 282 *a*
——— v. Langford .. [515 *h*]
——— v. Mc Kay [234 *d*, 336 *d*]
——— v. Strong .. [313 *d*]
Moorhouse v. De Passou 370 *d*
Moreton v. Moreton .. 91 *f*
Morewood v. Wood 266 *g*, [267 *b*], 305 *b*, 306 *f*, 307 *b*
Morgan's case .. [65 *f*]
Morgan v. Bowdler [108 *c*, 220 *f*, 221 *h*]
——— v. Evans .. [512 *f*]
——— v. Prior .. 376 *a*
——— v. Pryse .. 354 *d*
——— v. Shaw . [79 *b*], 87 *h*
Morish v. Foote .. 362 *d*
Morley, *Ex parte* .. [278 *a*]
——— v. Rennoldson .. [282 *c*]
Morphett v. Jones .. 4 *d*
Morrice v. Swabey .. [30 *d*]
Morris v. Davies .. 451 *b*, 475 *c*
——— v. Davis .. [384 *g*]
——— v. Ellis .. [423 *a*, 424 *a*]
——— v. Hawser .. [273 *d*]
——— v. Williams . [79 *h*]
Morrison v. Arnold 51 *b*, 145 *d* and *e*, 132, [142 *g*]
Morse v. Royal 29 *b* and *d*, [340 *f*]
Mortimer v. Mc Callan .. [166 *c*]
——— ——— v. Orchard 4 *b*, 4 *d*, 243 *b*
——— v. Shortall [289 *g*, 379 *d*]
Morton v. Scarlet .. [312 *e*]
Moseley v. Maynard .. [537 *e*]
——— ——— v. Taylor .. 458 *b*
Moser v. Platt .. [282 *c*]

Page

Mostyn, Lord, v. Spencer [90 *i*, 101 *a*, 219 *f*, 220 *e*]
Motteux v. Mackreth .. 339 *f*
Moulin v. Dallison . 235 *g*
Moulton v. Hutchinson .. [287 *a*]
Mounsey v. Burnham [48 *a*, 49 *b*, 172 *f*]
Mountsey v. Blamire .. 284 *a*
Mucklestone v. Brown .. 293 *e*
Mulgrave v. Dunbar, Lord 80 *c*, 86 *a*
Mulholland v. Hendrik [27 *a*, 474 *e*]
Mullet v. Hunt .. [102 *c*]
Mullins v. Pratt [12 *a*, 179 *e*, 272 *b*]
Mulvany v. Dillon 220 *d*, 338 *c*, 357 *e*
Murray, *Ex parte* .. [545 *d*]
——— v. Lawford .. [116 *k*]
——— v. Shadwell 330 *a*, 338 *a* and *e*, [340 *a*, *bis*], 340 *c*
——— v. Walter .. [30 *e*]
Mytton v. Harris .. [312 *e*]

N.

Napier v. Staples .. [518 *c*]
Nash v. East India Co. .. 58 *b*
——— v. Thorn .. [243 *a*]
Neale v. Marlborough, D. of [10 *a*]
Neat v. Latimer .. [39 *e*]
Neblet v. Daniel .. [261 *e*]
Needham v. Fraser .. [461 *b*]
——— v. Smith 329 *a*, 330 *d* and *f*, 536 *h*, [537 *e*]
Neeld v. Neeld .. [345 *e*]
Neep v. Abbott .. [188 *c*, 193 *c*]
Neilson v. Cordell 195 *a*, [514 *b*]
Nelson, Earl, v. Bridport, Lord [447 *e* and 448 *a*, 504 *e*]
——— v. Bronté .. [447 *e*]
——— v. Ponsford .. [24 *c*]
——— v. Squire .. [285 *b*]
——— v. Whittal .. 177 *e*
Neptune the Second .. [478 *b*]
Nesbitt, *In re* .. [395 *b*]
Nevil v. Johnson .. [259 *e*]
Newburgh v. Newburgh [160 *d*], 311 *a*,
———, Earl of, v. Newburgh, Css. of .. [278]
Newcome v. Matthews [236 *e*, 306 *g*]
Newhall v. Holt .. [456 *c*]
Newland v. Horseman [117 *k*], 120 *d*, [203 *e*]
Newman v. Norris .. [512 *c*]

Page
Newman v. Raithby [167 *f*]
Newton v. Berresford .. 40 *c*
——— v. Cordell .. [268 *d*]
——— v. Foot .. 220 *f*
——— v. Preston 8 *c*, [288 *f*, 292 *b*]
Nias v. N. and E. Railw. Co. [42 *a*]
Niblett v. Daniel .. 189 *f*
Niblet v. Daniel .. [493 *c*]
Nicholls v. Parker .. 306 *g*
Nicholson v. Haines .. [522 *b*]
Nicol v. Vaughan [282 *b*, 390 *a*]
—— v. Verelst .. [115 *g*]
Nightingale v. Dodd 79 *f*, 338 *a*, 339 *g*
Niman v. Parsons [263 *e*, 367 *b*]
Nix v. Cutting .. 349 *b*, 362 *f*
Noble v. Garland 114 *a*, [114 *g*, 115 *d*, 117 *d* and *e*, [120 *f*]
—— v. Kennoway .. 235 *f*
——— v. Noble .. [289 *g*]
Noel v. Bewley .. 487 *a*
—— v. Fitzgerald [194 *b*, 202 *c*]
—— v. Wills .. 442, 443 *a*
Nolan v. Lewis .. [544 *b*]
——— v. Shannon .. [69 *a*, 223 *c*]
Norbury v. Meade [282 *b*, 284 *c*]
Norden v. Williamson 339 *b*, 369 *b*
North, *Ex parte*, 544 *a*, [544 *b*]
Northampton Railway Co. v. Southampton Railway Co. [528 *d*, 532 *b*]
Norton v. Melbourne, Ld. [112 *b*]
——— v. Seton .. [233 *b*]
Novaes v. Dorrien .. 115 *g*
Nowen v. Davis .. [352 *d*]
Nurse v. Bunn .. [429 *a*]
——— v. Gwillim .. [339 *b*]

O.

O'Connor v. Cook .. 523 *b*
——— v. Marjoribanks [342 *f*]
O'Brien v. Connor .. 534 *c*
O'Callaghan v. Murphy .. 223 *c*
Odin, case of the .. 14 *a*
O'Farrell v. O'Farrell .. [123 *a*]
Ogle v. Cook .. 181 *a*
O'Hara v. O'Hara .. [143 *b*]
Okeden v. Clifden 399 *b* and *d*
Oldham v. Carleton 112 *h*, 113 *f*, 114 *c*
——— v. Lichford .. 293 *a*
Olive v. Gwin 410 *d*, 413 *d*, 420 *d*
Oliver v. Latham [336 *e*, 346 *b*, 359 *c*]
—— v. Price .. [543 *c*]
Omichund v. Barker 109 *a*, 247 *b*, 254 *g*, 332 *f*, 439 *d*, 470 *b*, [65 *f*, *bis*, 332 *c*]
O'Neal v. Hamill .. [504 *d*]
Page
Onge v. Truelock [127 *a*, 537 *e*]
Only v. Walker .. 227 *d*
Ormond, Lady, v. Hutchinson 15 *a*
Orr v. Morris .. 173 *a*
Osborne, *Ex parte* 353 *c*, [353 *c*, *bis*]
Osman v. Fitzroy .. 76 *b*
Osmond v. Tindall 214 *e*, 218 *f*, 230 *b*
Outram v. Morewood 305 *a*, 311 *d*
Overbury v. Overbury .. 301 *a*,
Ovey v. Leighton .. 26 *d*
Owen v. Jones .. [36 *a*]
—— v. Thomas 50 *b*, [49 *c*, 391 *b*]

P.

Paddock v. Forrester [47 *a*, 466 *b*]
Page's case 415 *b*
Page v. Fletcher .. [127 *a*]
—— v. Faucet .. 397 *a*
Paine v. Hall .. [474 *e*]
Palk v. Clinton .. 27 *b*
Palmer, *Ex parte* 544 *d*, [61 *d*, 354 *e*, 543 *k*]
——— v. Aylesbury, Ld. 259 *b*, 526 *g*, [124 *c*]
——— v. Leycester [12 *b*, 139 *d*]
Pardoe v. Price .. [269 *f*]
Paris v. Hughes [338 *g*, 340 *c*, 506 *b*]
—— v. Paris .. 205 *b*, 208 *e*
Parker v. Blythemore .. 85 *c*
——— v. Hoskins .. 252 *d*
——— v. Whitby .. 351 *c*, 491 *c*
Parkhurst v. Lowten 79 *f*, 79 *k*, 80 *h*, 81 *d*, 87 *c*, and *d* and *h*, 378 *c*, 386 *a* [268 *c*, 78 *d*]
Parkins v. Hawkshaw .. 177 *e*
Parkinson v. Ingram 63 *d*, 502 *a*, 508 *a*, [501 *d*, 509 *b*, and *c*]
Parry v. May .. [274 *c*]
Parson v. Lanoe .. [278 *b*]
Parsons v. Lanoe .. 301 *d*
Parteriche v. Powlett 11 *d*, 290 *a*, 468 *q*
Partridge v. Coates .. 274 *c*
——— v. Haycraft .. 26 *h*
——— v. Usborne 196 *c*, 492 *a*
Pascall v. Scott .. [220 *c*]
Patteshall, Doe d., v. Turford 315 *b*
Paxton v. Douglas .. 81 *b*, and *d*
Payne v. Burgrave .. [339 *d*]
Peacock v. Collens .. [106 *c*]
——— v. Harris .. [156 *b*]
——— v. Kernott [61 *a*, 221 *a*]
——— v. Monk .. 287 *a*, and *b*
Peake v. Highfield .. 451 *c*
Pearce v. Gray .. [432 *b*]
——— v. Grove .. 18 *d*

Page

Pearce v. Hooper .. 45 *e*, 173 *a*
——— v. Lodge .. 361 *b*
Pearson v. Hook . [545 *a*]
——— v. Rowland 223 *b*, [77 *a*]
——— v. Ward .. [121 *k*]
Pegge v. Burnell .. 144 *a*
Pelham, Ld., v. Newcastle, Dss. of [519 *c*]
Pellatt v. Ferrars .. 430 *a*
Pember v. Mathers .. 227 *d*
Pember v. Mather .. [4 *d*]
Pemberton v. Pemberton 184 *d*, 478 *d*
Pemby v. Mathew .. 227 *d*
Pendleton v. Grant .. [282 *c*]
Penderil v. Penderil [69 *d*, 105 *d*]
Pendrel v. Pendrel .. 475 *c*
Penfold v. Nunn .. 45 *a*
Pennell v. Mayer [227 *f*, 427 *f*]
Penney v. Edgar .. [116 *i*]
Perchard v. Benyon .. [282 *c*]
Percie's case .. 398 *f*
Perigal v. Nicholson 312 *e*, 331 *b*
Perrott v. Bryant .. [479 *b*]
Perry v. Silvester 51 *b*, 203 *f*, 221 *a*, [225 *a*]
—— v. Smith .. [42 *a*, 381 *a*]
—— v. Watts .. [174 *a*, 341 *d*]
Petcht v. Dalton .. [331 *b*]
Peterborough v. Norfolk [259 *e*]
————, Earl of, v. Germaine [271 *b*]
Peter's, St., Worcester, v. Old Swinford .. 385 *a*
Petre, Ld., v. Blencoe .. 281 *a*
Petrie's case .. 379 *d*
Peynell's case .. 286 *b*
Peyton v. Green .. 6 *a*
Philips v. Bucks, Duke of, 339 *a*
——— v. Prentice .. [543 *c*]
Phillips v. Bury .. 435 *c*
——— v. Carew .. 124 *d*
——— v. Goding .. [25 *e*]
——— v. Hunter .. 447 *b*
Philipps v. Wilcox .. [354 *a*]
Pickering v. Ely, Bp. of [308 *f*]
——— v. Rigby .. 44 *c*
——— v. Rudd .. 22 *g*
Pickersgill, *In re* .. [542 *c*]
Picton's case, General .. 400 *c*
Piddock v. Brown 340 *c*, [176 *c*, 338 *g*, 339 *b*, 341 *b*, 506 *b*]
Piercy v. —— .. 257 *c*
—— v. Roberts .. [478 *f*]
Pierrepoint v. Scarlett .. [281 *d*]
Pigott v. Croxhall 207 *a*, 208 *k*, 370 *e*, [208 *i*]
—— v. Penrice .. [184 *d*]
Pigot's case .. 452 *e*

Page

Pike v. Crouch .. 258 *c*
Pilkington v. Hunsworth [31 *d*]
Pilling v. Armitage .. 4 *d*
Pimm v. Curell [305 *e bis*, 422 *d*, 424 *d*, 430 *d*]
Pitcairne v. Ogbourn .. 290 *a*
——— v. Ogbourne .. [277 *a*]
Pitcher v. Rigby .. 426 *a*
Pitman v. Maddox 313 *g*, 314 *g*
Pitt v. Willis .. 29 *g*, [340 *f*]
Pitton v. Walker .. 162 *b*
——— v. Walter .. 258 *f*
Platt v. Routh .. [178 *e*]
Plompin v. Retts .. [367 *b*]
Pluckrose v. Platt .. [151 *a*]
Plume v. Beale .. [444 *a*]
Plummer v. Bentham .. 253 *d*
——— v. May [14 *c*, 21 *a*, 329 *b*]
Plunkett v. Cobbett .. 86 *d*
Poderson v. Stoffles .. 351 *a*
Podmore v. Gunning .. 292 *a*
Pole v. Lord Somers 294 *b*, 298 *d*
Pollard v. Bell .. 445 *c*, and *e*
Pomfret v. Smith .. 311 *d*, and *e*
——— El. of, v. Windsor, Ld. 189 *d*
Poole v. Dias .. [309 *g*]
—— v. Warren .. [174 *b*, 272 *f*]
Pope v. Skinner .. 241 *d*
Porchard v. Fowlkes .. [221 *a*]
Porter v. Baker .. [135 *b*]
Portmore, Lord, v. Morris 278 *a*
Potter v. Potter .. 39 *e*, 180 *b*
Potts v. Adair .. 30 *l*
—— v. Curtis [78 *g*, 69 *c*, 196 *b*]
—— v. Durant 191 *a*, [186 *f*, 313 *c*]
Powell v. Cleaver .. 299 *e*
——— v. Lassalette 27 *b*, 457 *d*, [31 *d*]
——— v. Monchett .. [282 *e*]
——— v. Wood .. 525 *c*
Powys v. Mansfield [27 *a*, 232 *e*]
Pratt v. Barker .. [261 *e*]
Prebble v. Boghurst .. 531 *a*
Prentice v. Philipps .. [30 *k*]
Preston v. Carr .. 40 *b*
Price v. Assheton .. [156 *b*]
—— v. Bridgman .. [143 *b*]
—— v. Copner .. 462 *c*
—— v. Lytton .. 518 *c*, [428 *b*]
—— v. Torrington, Ld. .. 313 *f*
Prickell v. Hulse .. [462 *a*]
Prince v. Blackburne .. 264 *f*
Pring v. Pring .. [294 *b*]
Pritchard v. Draper 29 *f*, [464 *b*]
——— v. Foulkes [59 *b*, 378 *b*]
——— v. Gee .. [123 *b*]
——— v. Hitchcock .. [434 *d*]
——— v. Quinchant .. [289 *f*]
Pritchett v. Honeyborne .. 207 *a*

Page

Pritt v. Fairclough .. 314 *b*
Proctor v. Lainson .. [311 *e*]
Prose v. Clarke .. [272 *e*]
Prosser v. Guillim .. [313 *d*]
——— v. Watts .. 479 *a*
Pullan v. Rawlins [269 *a*, and *d*, 272 *a*]
Purcel v. Macnamara [517 *c*, 521 *c*]
Purcell v. Macnamara 201 *a*, 207 *a*, 207 *b*, [207 *b*], 209 *d*, 330 *b*, [506 *b*], 515 *h*, 517 *c*, 521 *c*]
Pye, *Ex parte* .. 297 *d*, 299 *b*
—— v. Rea .. 22 *f*
Pym v. Blackburn .. [278 *a*]
—— v. Bowerman . [490 *b*]
Pyncent v. Pyncent 218 *d*, [58 *e*]
Pytt v. Kendall .. [334 *a*]

Q.

Quantock v. Bullen .. [261 *e*]
Queen's case .. 333 *b*, [388 *a*]

R.

Radcliffe v. Furseman 40 *a*, 41, 382 *c*
Radford v. Mackintosh .. 463 *e*
Radnor parish, case of .. [478 *f*]
Rainsby v. Power .. [127 *a*]
Ramsbottom v. Gosden .. [291 *d*]
Rancliffe v. Parkyns .. 186 *a*
Randel v. Richford .. 105 *d*
Randleson, *Ex parte* .. [310 *b*]
Randolph v. Gordon .. [265 *g*]
Rands v. Pushman . [522 *a*]
——— v. Thomas .. 385 *d*
Raner v. Mitford .. [117 *k*]
Ravee v. Farmer .. 426 *b*
Ravenscroft v. Frisby .. [478 *e*]
Rawlins v. Desborough .. [304 *b*]
——— v. Powell .. 537 *e*
Rawson v. Dundas .. [439 *b*]
Rayner v. Oastler .. 462 *c*
Read v. Hide .. 415 *d*, 416 *f*
Reardon v. Minton .. [174 *b*]
Reay v. Richardson .. [277 *b*]
Reddington v. Reddington [292 *b*]
Reech v. Kennegal .. 4 *d*, 293 *b*
Reed v. Baxter .. [331 *c*]
—— v. Everard .. [330 *e*]
—— v. Jackson .. 305 *e*
—— v. James .. 354 *d*
Reeks v. Postlethwaite .. [4 *b*]
Reeves v. Newenham .. [282 *c*]

Page

Reg. v. Adderlany, E. [313 *d*, 463 *c*]
—— v. Baker .. [316 *b*]
—— v. Bliss .. [305 *e*]
—— v. Boynes .. [159 *b*]
—— v. Christian [150 *f*, 152 *b*, 159 *e*
—— v. Cope .. [308 *f*]
—— v. Douglas .. [126 *a*]
—— v. Goldshede .. [428 *f*]
—— v. Hall .. [308 *f*, 464 *c*]
—— v. Kenilworth .. [269 *f*]
—— v. Leigh and Executors [236 *e*]
—— v. Pembridge .. [159 *f*]
—— v. St. George .. [204 *d*]
—— v. Stoke upon Trent [280 *f*]
—— v. Sutton, Lady. [165 *g*, 305 *e*]
—— v. Williams .. [267 *c*]
—— v. Worth, Inhabitants of [310 *b*, 311 *c*]
Reid v. Margison .. 148 *e*
Reilly v. Reilly .. [202 *a*, 108 *c*]
Retemeyer v. Obermuller [273 *b*, 275 *a*]
Revett v. Braham .. 266 *g*
Rex v. Allgood . 170 *a*
—— v. All Saints .. 342 *d*
—— v. Alsley .. [65 *f*]
—— v. Antrobus .. [165 *g*, 305 *c*]
—— v. Arundell 52 *e*, 163 *e*, 269 *c*
—— v. Barnitt .. 404 *e*
—— v. Bedell .. 384 *h*
—— v. Bellringer .. 281 *d*
—— v. Boston .. 349 *e*, 434 *b*
—— v. Bray 347 *a*, 348 *bis*, 355 *a*
—— v. Buckeridge .. 355 *c*
—— v. Castel Careinion .. 336 *a*
—— v. Castleton .. 270 *c*, 273 *a*
—— v. Cliviger .. 342 *d*
—— v. Crossley .. 333 *f*
—— v. Dixon .. 384 *c*
—— v. Dunnell .. 331 *e*
—— v. Dyson .. [249 *b*, 331 *c*]
—— v. Eardisland .. 425 *a*
—— v. Ellis .. 235 *c*, 236 *a*
—— v. Eriswell 251 *c*, 305 *a*, *bis*
—— v. Falkland, Ld. .. 49 *d*
—— v. Gardner .. 400 *l*
—— v. Gordon, Ld. G. .. 83 *b*
—— v. Grundon .. 435 *e*
—— v. Haines .. 167 *c*
—— v. Harborne [474 *c*, 480 *b*, 483 *a*]
—— v. Harringworth .. 175 *b*
—— v. Haslingfield .. 426 *d*
—— v. Haynes .. 414 *e*
—— v. Hayward .. [316 *b*]
—— v. Holt .. 400 *e*, *g*, and *i*
—— v. Hopper 417 *b*, 418 *c*, 419 *a*

Page

Rex v. Hornsey .. 355 *c*
—— and Hunsdon v. Arundell 52 *e*, 163 *e*, 269 *c*
—— v. Jefferies .. 404 *e*
—— v. Johnson, J. .. 270 *b*
—— v. Joliffe .. 258 *d*, and *g*
—— v. Kea .. 384 *h*
—— v. King .. 169 *k*
—— v. Long Buckby .. 482 *k*
—— v. Lucas .. 167 *b*
—— v. Luckup .. 368 *e*
—— v. Mansfield .. [384 *g*]
—— v. Mattingley .. 288 *f*
—— v. Mawbey .. 254 *e*
—— v. Mayor, citizens, and commonalty of London .. 354 *f*
—— v. Middlezoy .. 173 *a*
—— v. Morphew .. 250 *d*
—— v. Morton .. 269 *f*, 270 *e*
—— v. Olney .. 288 *f*
—— v. Pembridge .. [276 *c*]
—— v. Pepys .. 434 *a*
—— v. Pritchard [249 *b*, 331 *c*]
—— v. Randall .. 254 *c*
—— v. Read .. [5 *b*]
—— v. Scammonden .. 288 *f*
—— v. Scot .. 281 *e*
—— v. Shaw .. 148 *f*
—— v. Sheriff of Chester 170 *d*
—— v. Smith .. 320 *c*
—— v. Spilsbury .. [316 *b*]
—— v. St. Mary's, Nottingham 81 *a*
—— v. St. Pancras .. 425 *a*
—— v. Sutton 395 *a*, 399 *a*, 400 *h*
—— v. Taylor .. [332 *c*]
—— v. Tower .. 167 *b*
—— v. Travers .. 331 *e*
—— v. Twining .. 480 *b*
—— v. Twycross .. [167 *b*, 271 *c*]
—— v. Varlo .. 281 *d*
—— v. Watkinson .. 383 *h*
—— v. Watson .. 273 *d*
—— v. Whitley, Lower .. 463 *b*
—— v. Wickham [462 *b*, 463 *a*]
—— v. Wilde .. 407 *b*
—— v. Williams 358 *d*, [65 *f*]
—— v. Withers .. 378 *e*, 384 *d*
—— v. Wrangle .. [277 *b*]
Reynell v. Yard .. [215 *c*]
Reynish v. Martin .. 4 *a*
Rhodes v. de Beavoir .. [341 *a*]
Rich v. Cockell .. [182 *b*]
—— v. Jackson .. 278 *a*
—— v. Tapping .. 385 *b*
Richards (or Brodrepp) v. Cole 84 *c*
——— v. Frankum .. [187 *c*]

Page

Richardson v. Lowther .. 193 *a*, [127 *a*, *bis*]
Riddeford v. Partridge .. [305 *d*]
Ridgeway v. Darwin 15 *c*, 467 *d*
Ridifer v. O'Brien .. 521 *e*
Ridley v. Obee .. 195 *d*
Rigg v. Curgenven .. 463 *b*
Ripley v. Thompson .. 362 *a*
Rigden v. Vallier .. 532 *a*
Rishton, *dem.*, Nesbitt, *ten.* [317 *c*]
Rist v. Hobson .. 482 *d*
River's case .. [286 *b*]
Rivers v. Griffith .. 242 *c*
Robert v. Millechamp .. 222 *a*
Roberts v. Eddington .. 255 *a*
——— v. Fortune .. 435 *d*, 435 *k*
——— v. Justice .. [313 *d*]
——— v. Maiston .. 233 *d*
——— v. Roberts .. 11 *d*
Robins v. Foster .. [135 *b*]
——— v. Waseley .. [124 *g*]
Robbins v. Wolseley .. [204 *c*]
Robinson v. Cooper .. 180 *a*
——— v. Cox .. 233 *c*
——— v. Cumming .. 365 *b*
Robinson v. Gee .. [278 *a*, 289 *a*]
——— v. Markes [126 *a*, 143 *c*, 304 *e*]
——— v. Martin .. [252 *c*]
——— v. Soames .. [114 *g*]
Robson v. Att. Gen. .. [318 *c*]
——— v. Kemp 384 *d*
Rochester, Bp. of, v. Att. Gen. 492 *d*
Rock v. Unett .. [544 *b*]
Roe v. Ashford .. [205 *e*, 545 *c*]
—— v. Aylmar .. 170
—— v. Clarke .. [391 *b*, 482 *e*]
—— v. Day .. [187 *c*]
Roe d. Johnson v. Ireland 485 *e*
—— d. Trimleston, Ld., v. Kemmiss [186 *c*, 430 *a*, 468 *o*]
—— v. Lord .. 308 *b*, 318 *b*
—— v. Parker .. 235 *f*
Rogers v. Allen .. 311 *a*, and *d*
——— v. Custance .. [273 *d*]
——— v. Earl .. 289 *f*
——— v. Seale .. 85 *e*
Rogerson v. Whittington 338 *d*, 526 *b*
Rolf v. Dart .. 148 *e*
Rolt v. Birch .. [200 *b*]
Rolvend's case, Vicar of .. 424 *b*
Romney —— v. .. 116 *g*
Rookwood's case .. 208 *d*, 293 *b*
Roscommon Peerage case [421 *b*]
Rose v. Clarke .. [506 *b*]
Rosewell v. Bennetts .. [298 *d*]
Rossiter v. Pitt .. [136 *a*, 145 *a*]

Page

Rothers v. Elton .. 362 *b*
Rougemont v. Royal Exchange Insurance Company 112 *h*, 113 *g*
Rowe v. —— 121 *f*, 123 *c*, 124 *f*
—— v. Brenton .. 166 *a*
—— v. Creagh .. [189 *d*]
—— *Ex parte* .. [436 *e*]
—— v. Teed .. 21 *c*
Rowland v. Ridley .. 520 *b*
—— v. Sturgis .. [11 *d*]
Rowley v. Ridley .. [106 *a*]
—— v. Adams 203 *c*, 511 *e*, [507 *a*]
Rowntree v. Jacob .. 276 *e*
Royal Insurance Co. v. —— 114 *b*
Rudd v. Wright .. [308 *f*]
Rudd's case .. 350 *f*
Rude v. Whitechurch .. 15 *c*
—— v. Whitchurch .. [429 *e*]
Ruding v. Newell .. 236 *b*
Rush v. Peacock .. [274 *c*]
Rushworth v. Pembroke, Ces. of 259 *e*
Russell v. Atkinson .. 205 *c*
—— v. Dickson [294 *b*, 444 *a*]
—— v. Russell .. [354 *d*]
Rust v. Baker .. [250 *c*, 483 *a*]
Ruston's case .. [65 *f*]
Rutherford v. Maule .. [267 *b*]
Rutter v. Baldwin .. 345 *b*
Rutland, D. of, v. Rutland, Dss. of [294 *c*]
Rutlin v. Barry .. [67 *e*]
Ryan v. Anderson .. [10 *c*]
Ryder v. Malbone .. 320 *b*
Ryle v. Haggie .. [310 *b*]

S.

Sadler v. Lovatt .. [27 *a*, 196 *c*]
—— v. Robins .. 447 *a*
Saint John v. Besborough, Earl of, [245 *d*, 545 *a*]
—— Peters, Worcester, v. Old Swinford .. 385 *a*
Salisbury, Earl of, v. Cecil 43 *b*
Saltern v. Melhuish .. 269 *c*
Sampson v. Thoreton . [273 *d*]
Sanderson, *Ex parte* .. [508 *a*]
—— v. Piper .. [279 *b*]
Sandford v. —— .. 221 *e*
—— v. Biddulph .. 509 *c*
—— v. Paul 200 *b*, 202 *d*, 198 *b*
—— v. Seymour [61 *d*, 511 *e*]
Sanford v. Raikes .. [282 *c*]

Page

Sanford v. Remington 379 *e*, 383 *g*, 389 *a*, and *b*
Sands v. Knighton .. [5 *b*]
San Jose De Lota .. [457 *b*]
Sanson v. Rumsey .. [46 *c*]
Saph v. Atkinson .. [349 *g*]
Saunders v. Leslie 389 *b*, [282 *b*]
Savage v. Brocksopp 228 *b*, [4 *d*, 333 *f*
—— v. Carroll 243 *c*, [291 *e*]
Sawyer v. Birchmore .. 87 *f*
—— v. Bowyer .. 201 *a*, 221 *e*
Say and Sele's case, Lord .. 384 *c*
Sayer v. Garnett .. [354 *e*]
Sayer v. Wagstaff [101 *a*, 220 *e*, and *h*, 221 *i*]
Scawen v. Scawen [282 *c*, 315 *a*]
Schiff, *In re* .. [542 *c*]
Scholefield, *In re* .. [98 *b*]
Scholes v. Chadwick .. [309 *b*]
Scholey v. Goodman .. 344 *c*
Scinotti v. Bumstead .. 171 *h*
Scott v. Allgood .. [194 *b*]
—— v. Edwards .. 8 *c*
—— v. Fenwick .. 331 *b*, 370 *c*
—— v. Lifford .. 374 *c*
—— v. Merry .. [289 *c*]
—— v. Nixon .. [485 *e*]
—— v. Scott .. [345 *e*]
—— v. Shearman .. 435 *g*
—— v. Van Sandau .. [126 *a*]
Scraggs v. Scraggs .. 357 *b*
Scrimshire v. Scrimshire [334 *a*]
Seeley v. Boreham .. [25 *d*]
Sellack v. Harris .. 293 *b*
Sells v. Hoare .. 333 *b*
Selway v. Chappell [329 *a*, 330 *e*]
Selwood v. Millmay .. [282 *c*]
Selwyn v. Gill .. [101 *a*, 220 *e*]
Selwyn's case .. 220 *e*
Sergison v. Sealy .. 438 *b*
Shackell v. Macauley .. 113 *i*
Shaftesbury, Lady, v. Arrowsmith 32 *e*
Shalcross v. Wright .. [179 *e*]
Shannon Higginson [472 *a*, 540 *c*]
Sharp v. Carter .. 83 *c*
Sharpe v. Lambe .. [274 *a*]
Shaw v. Lindsay 73 *b*, 104 *a*, 198 *d*, 202 *d*, [67 *e*, 219 *d*, 220 *f*, 221 *i*, 219 *e*, 220 *d*, 224 *g*]
Shayle, *Ex parte* .. [544 *c*]
Sheafe v. Rowe [233 *a*, and *b*, 233 *b*]
Shears, *Ex parte* .. [545 *d*]
Sheath v. York .. 302 *a*, 303 *a*
Shedden v. Baring .. 114 *f*
Sheffield v. Duchess of Bucks. 12 *a*

Page

Shelberry v. Briggs 29 *a*, [28 *e*]
Shelburne v. Inchiquin .. 289 *e*
Shelburn v. Inchiquin . [292 *b*]
Shelley v. —— 122 *a*, and *f*, [475 *c*]
Shelling v. Farmer .. 171 *g*
Shepherd v. Downing .. 87 *d*
——— v. Morris .. [27 *a*]
——— v. Shorthouse .. 414 *f*
Shepley v. Todhunter .. 187 *c*
Sheppard v. Gosnold .. 281 *e*
Sherborne v. Napier [307 *e*, 321 *a*]
Shergold v. Boone 289 *f*, [282 *c*]
Sheriff v. Coates .. 146 *a*, 455 *b*
Sheward v. Sheward .. 117 *d*
Shirley v. Ferrers [121 *k*, 501 *a*]
Shore v. Bedford .. [42 *a*, 381 *a*]
Short v. Lee .. 312 *b*, [313 *a*]
Shudal v. Jekyll .. 299 *i*
Shudall v. Jekyll .. [298 *d*]
Sidden v. Foster .. 518 *c*
Sidgier v. Birch .. 64 *a*, [507 *a*]
Sillick v. Booth [483 *a*, 486 *b*, 487 *e*]
Sills v. Brown .. [258 *c*]
Simons v. Gutteridge .. [516 *b*]
——— v. Smith .. 373 *b*
Simpson v. Swettenham .. 32 *e*
——— v. Thoreton .. [272 *a*]
Sinclair v. Arne .. [178 *e*]
——— v. Baggaley .. [288 *g*]
——— v. James .. 222 *b*
——— v. Sinclair .. [357 *c*]
Skeffington v. Whitechurch [309 *g*]
Skerrett v. Lynch .. [15 *a*, 429 *a*]
Skilbeck v. Garbett .. [187 *c*]
Skipwith v. Shirley 271 *a*, [271 *c*]
Slack v. Evans .. [245 *c*]
Slane Peerage case [152 *f*, 314 *c*, 319 *c*, and *f*, 321 *a*, 324 *a*, and App. 24]
Slaney v. Wade [319 *a*, and *f*, *bis*. 324 *b*,
Slatterie v. Dooley [277 *b*, 456 *c*]
Smales v. Chayter .. 111 *b*
Small v. Attwood .. 105, 107
Smartle v. Williams 417 *b*, and *e*, 418 *a*
Smith v. Althus .. 201 *a*
——— v. Atkins .. [505 *e*]
——— v. Bicknell 269 *g*, 275 *d*
——— v. Bigge 387 *a*, [354 *a*, 365 *c*, 478 *f*]
——— v. Beaufort, D. of .. [39 *e*]
——— v. Blackham .. 350 *b*
——— v. Chandos .. [339 *g*]
——— v. Clarke .. 231 *d*
——— v. Doe d. Jersey .. 282 *c*
——— *Ex parte* .. 545 *a*, [543 *k*]

Page

Smith v. E. I. Comp. [46 *e*, 377 *d*]
——— v. Fell .. [378 *b*]
——— v. French .. 331 *f*
——— v. Graham 202 *a*, 221 *d*, [225 *a*]
——— v. Kirkpatrick .. 68 *d*
——— v. Low .. 461 *b*
——— v. Massie .. [43 *c*]
——— v. Morgan [220 *k*, 341 *a*, 460 *b*]
——— q. t. v. Prayer 348 *a*, 349 *f*
——— v. Sainsbury .. 267 *a*
——— v. Sleap .. [275 *c*]
——— v. Smith . [313 *d*, 463 *g*]
——— v. Spencer .. [491 *b*, 523 *e*]
——— v. Turner 209 *e*, [141 *a*]
——— v. Veale .. 262 *b*
——— v. Woodroffe .. 542 *a*
——— v. Woodruffe .. [542 *a*]
Smithson v. Hardcastle .. 79 *k*
———, Sir Hugh's case 160 *e*
Smyth v. Morgan .. [313 *d*]
Snell v. Silcock .. [241 *c*, 271 *b*]
Snellgrove v. Bailey .. [268 *c*]
Snelgrove v. Stevens .. [64 *a*]
Snow v. Cutler .. 155 *e*
Sociedade Feliz .. [445 *k*]
Solita v. Yarror .. 266 *g*
Somerset, D. of, v. France 155 *e*, 235 *i*
Southampton, Mayor of, v. Graves 7 *e*, 8 *b*, 171 *b*, [31 *a*]
South Sea Company v. Doliffe 380 *b*
Southwell v. Limerick, Lord [123 *b*]
Spalding v. Bragham [71 *b*, 223 *e*]
Sparin v. Drax .. 429 *c*
Sparke v. Ivatt .. 524 *d*
——— v. Middleton .. 378 *d*
Sparkes v. Cater .. [298 *g*]
Speed v. Martin .. 227 *d* [5 *a*]
Speidel v. Fuller .. [354 *c*]
Spence v. Allen .. 197 *g*
Spenceby v. Schullenberg 384 *a*
Spicer, Doe d. v. Lea .. 285 *a*
——— v. Cooper .. [260 *f*]
Spong v. Allen .. 58 *d*
Spragg v. Corner .. 44 *b*
——— v. Stone .. 301 *d*
Spurrier v. Fitzgerald 482 *d*, [12 *a*, 276 *g*]
Spybey v. Hide .. 242 *c*
Stace v. Mabbott .. 197 *b*
Stackfleth v. De Tastet .. [263 *d*]
Stafford v. Llewellyn .. 484 *d*
Stammers v. Dixon .. 281 *a*
Standen v. Edwards 197 *b*, 385 *a* [528 *d*]

Page

Standen v. Standen 294 *b*, 385 *a*, [287 *a*]
Standish v. Radley [474 *f*, 536 *f*]
Stanley v. Robinson .. [232 *d*]
——— v. White 235 *d*, 306 *c*, 309 *d*
Stanney v. Walmesley [69 *b*, 200 *c*]
Stanwix's case, General .. 487 *c*
Stead v. Heaton .. 310 *b*
Stedden v. Baring .. 114 *f*
Stedman v. Gooch .. 164 *c*
Steele v. Stewart .. [380 *e*]
Steinkeller v. Newton [67 *e*, 126 *a*, 220 *k*]
Stevens, *Ex parte* .. [389 *a*]
——— v. Moss 321 *d*, 323 *b*, 394 *k*
——— v. Solway .. [138 *c*]
Stephenson v. Anderson .. 538 *f*
——— v. Heathcoate [282 *c*]
——— v. Nevinson .. 350 *d*
Stewart v. Barnes .. [359 *c*]
Steyning v. Burgesses of Droitwich 398 *f*
Still v. Hoste .. [286 *b*]
Stockdale v. Hansard .. [439 *b*]
Stockhold v. Collington .. 105 *a*
Stokes v. Mackerral .. 331 *a*
——— v. Moore .. [278 *a*, 279 *d*]
——— v. Taylor .. 179 *d*
Stokoe v. Robson .. 269 *g*, 275 *d*
Storey v. Lennox, Lord G. [30 *l*]
Storke v. Storke [277 *b*, 282 *c*]
Story v. Lennox, Lord G. [42 *a*]
Stothert v. James .. [313 *d*]
Strachan v. Green [114 *g*, 115 *b*]
Strange v. Collins .. [18 *c*]
Stratford v. Aldborough, Ld. [123 *a*]
——— v. Green [150 *f*, 153 *a*, 158 *b*]
——— v. Powell .. [277 *a*]
Stratham v. Hull .. 232 *f*
Strathmore v. Strathmore [87 *k*]
Stratton v. Payne .. [282 *c*]
Strickland v. Aldridge .. 293 *e*
——— v. Strickland [137 *f*]
Strode v. Strode .. 231 *a*
——— v. Winchester .. [309 *f*]
Strother v. Dutton .. [490 *a*]
Strutt v. Bovingdon .. 425 *a*
Stracey v. Elph .. 478 *f*
Stratford v. Hogan .. 384 *a*
Stuart v. Bute, Lord [64 *a*, 82 *b*]
——— v. Greenall 524 *e*, [212 *b*, 312 *e*, 533 *c*]
Stubbs v. —— .. 533 *d*, [212 *b*]
——— v. Sargon [512 *f*, 544 *b*]
Stultz v. Stultz .. [274 *a*]
Sturge v. Buchannan [272 *a*, 310 *d*]

Page

Sturge v. Buchanan .. [187 *c*, *bis*, 267 *b*]
Sturt v. Mellish .. [274 *a*]
Stypes v. Dunbar . 86 *f*
Suffolk v. Greenvill .. [338 *b*]
——— Earl of, v. Green .. 83 *g*
Suitors of the Court, *In re* [530 *c*]
Susan Hamilton .. [433 *d*]
Sussex Peerage case [308 *f*, 315 *b*, 323 *a*]
Sutton Coldfield, Corp. of, v. Wilson [355 *b*, 356 *g*]
——— Corp. of, v. Wilson 370 *b*, and *f*, [222 *b*]
Swan v. Turberville .. [203 *e*]
Swaine v. Perne .. 423 *a*
Sweet v. Lee .. [278 *a*]
——— v. Southcote .. 85 *a*
Swinford v. Horne .. 200 *c*
Sydney v. Sydney .. 233 *d*
Synd Abbas Ali Khan v. Yadeum Ramy Reddy .. [268 *c*]

T.

Tanner v. Byne .. 288 *c*
Talbot v. Hodson .. 175 *c*, 177 *g*
——— v. Lewis .. [307 *d*]
Taplin v. Atty .. 274 *c*
Tarleton v. Tarleton 446 *a*, and *d*
Tatham v. Wright .. 179 *c*, 185 *a*
Taunton v. Peplar .. 177 *f*
Tawney v. Crowther .. 290 *a*
Tawell's confession case .. [381 *c*]
Taylor v. Barclay .. 400 *a*
——— v. Bundell [24 *d*, 30 *d*, 82 *b*]
——— v. Cook .. [267 *b*, 442 *a*]
——— v. Devey .. [306 *g*]
——— v. Cohen .. 359 *b*, 362 *a*
——— v. Cole .. 427 *c*
——— v. Cooke .. 266 *g*
——— *Ex parte* .. [167 *f*]
——— v. Foster .. 380 *g*
——— v. Jones .. 416 *e*, 418 *b*
——— v. Milner .. 30 *l*, 42 *a*
——— v. Obee .. 195 *e*
——— v. Taylor .. [292 *b*]
——— v. Wrench .. 26 *b*
Teague v. Richards .. [490 *a*]
Teale v. Teale .. 145 *d*, [142 *g*]
Templeman v. Montague .. 283 *c*
Tenant v. Hamilton .. [232 *e*]
Tennant v. Strachan .. 354 *c*
Terry v. Huntington .. 435 *k*
Terwit v. Gresham .. 260 *f*
Thanet, Lord, v. Paterson 163 *a*
Thellusson v. Gosling .. 401 *a*

Page

Thiern v. Mill .. 474 *d*
Thomas v. Connell .. [464 *b*]
——— v. Dunn .. [31 *a*]
——— v. Jenkins .. [306 *g*]
——— v. Pearce .. 368 *g*
Thompson's case .. [127 *a*]
Thompson v. Donaldson 424 *e*, 444 *c*
——— v. Harrison .. 340 *e*
——— v. Lamb .. 467 *d*
——— v. Lambe .. [522 *a*]
——— v. Powles .. 399 *e*
——— v. Sheppard .. 302 *i*
——— v. Tooke .. [222 *c*]
——— v. Travers .. [269 *f*]
——— v. Waller .. 536 *e*
Thoru, Roe d., v. Lord 308 *b*, 318 *b*
Thornborough v. Baker .. [109 *d*]
Thornton v. Knight [179 *e*, 240 *a*]
Thorpe v. Gisburn .. 265 *g*
——— v. Macaulay .. 116 *a*
Thoroughgood's case .. 176 *f*
Throckmorton v. Cromwell [203 *e*]
Thurston v. Nutton .. 22 *c*, 51 *d*
Thwaites v. Smith 350 *a*, [345 *e*]
Thynne v. Thynne .. 292 *c*
Tillotson v. Hargreave 51 *e*, 258 *b*, 511 *d*, [511 *e*]
Tilly's case .. 366 *e*, 367 *b*
Tinnney v. Tinney .. [278 *a*]
Tinkler v. Walpole .. 419 *a*
Title v. Grevell .. 385 *d*
Todd v. Aylwin .. 115
Tomkins v. Harrison .. [124 *f*]
Tomlinson v. Booth .. 39 *e*
——— v. Lymer .. 39 *e*
——— v. Wilkes .. 358 *a*
Took v. Thomas .. [203 *e*]
Tooker v. Duke of Beaufort 413 *b*
Toole v. Medlicott .. 4 *d*, [291 *c*]
Tooth v. Dean and Chapter of Canterbury .. 14 *c*
Topham v. Lightbody .. [490 *a*]
——— v. McGregor .. [67 *e*]
Toulmin v. Copeland .. [510 *b*]
Towers v. Moor .. 276 *d*, [282 *c*]
Townsend v. Ives 50 *d*, 181 *a*, 184 *d*
Townshend, *Ex parte* [543 *h*, 545 *a*]
——— M. of, v. Standgroom 289 *d*, 290 *a*, [278 *a*]
——— Peerage case .. [135 *a*]
Townson v. Tickell .. 478 *f*
Tracey Peerage case [170 *f*, 319 *f*]
Traherne v. Burdus [69 *d*, 105 *d*]
Traill v. Twyford .. [521 *d*]
Travers v. Buckley .. 28 *f*
Trelawney v. Thomas .. 350 *f*
Trent v. Hanning .. 532 *b*
Trevor v. Trevor .. 478 *c*

Page

Trezevant v. Fraser .. 451 *a*, 517 *b*
Trimleston, Lord, v. Kemmis [276 *a*, 309 *b*]
Trimmer v. Bayne .. [297 *c*]
Trewhitt v. Lambert .. [277 *b*]
Trimmer v. Rayne .. [298 *g*]
Trotter v. Blake .. 163 *b*
——— v. Trotter 513 *b*, [507 *d*, 513 *b*]
Trowel v. Castle .. 162 *f*, 163 *c*, 452 *a*
Tufton v. Whitmore .. [465 *b*]
Tullock v. Hartley [4 *a*, 196 *b*]
Tunley v. Evans .. [464 *b*, 465 *d*]
Tunstall v. Trappe .. 271 *a*, 419 *c*
Turbot v. —— .. [127 *a*]
Turner v. Burleigh 191 *a*, 494 *a*, [53 *a*, and *d*, 71 *a*, *bis*, 106 *e*]
——— v. Eyles .. 244 *c*
——— v. Pearte .. 369 *c*
——— v. Trelawney [70 *a*, 106 *f*]
Turquand v. Knight .. [380 *e*]
Twaytes v. Smith .. 350 *a*
Twee Gebroederen .. [254 *g*]
Twyning v. Morrice .. 339 *g*
Tyler v. Drayton .. 45 *g*
Tyndal, Doe d., v. Heming 173 *a*
Tyrrell v. Hope .. [278 *a*, 289 *a*]
Tyrrwhitt v. Wynne .. 236 *e*

U.

Udall v. Walton [352 *c*, 354 *a*]
Ulric v. Litchfield [282 *c*, *bis*, 289 *f*, 294 *c*]
Uncle v. Watson 309 *b*, [309 *a*]
Underwood v. Lord Courtown 466 *b*
Upjohn v. Upjohn .. [490 *a*]
Uvedale v. Halfpenny .. 289 *g*
Uxbridge v. Staveland .. 84 *d*

V.

Vaillant v. Dodemede 79 *c*, 87 *d*, 380 *c*, 383 *d*
——— v. Dodomead [78 *e*, 378 *c*, 387 *b*]
Van v. Corpe .. [338 *g*, 506 *b*]
Vaughan v. Fitzgerald .. [135 b]
——— v. Lloyd [58 *e*], 200 *b*, 221 *e*, 237 *c*, 238 *c*, 519 *b*
——— v. Worrall 329 *a*, and *d*, 330 *a*, 330 *d*, *bis*, 348 *b*, 352 *b*, 369 *c*, 370 *a*, 374 *b*

Page
Vaux Peerage .. [307 *e*, 482 *b*]
Vent v. Pacey .. 41 *a*
Vicary's case .. [466 *c*, 468 *c*]
Villars v. Beaumont .. 288 *a*
Ville de Varsovie, case of .. 333 *e*, [334 *b*]
Villiers v. Villiers .. 270 *k*
Vowles v. Young 316 *i*, 317 *a*, and *e*, 319 *b*, [342 *e*]

W.

Waddington v. Cousins [267 *b*]
Wade's case .. 242 *b*
Wade v. Broughton .. [267 *b*]
——— v. Gwye .. [135 *b*]
Wadley v. Baylis .. 281 *b*
Wadsworth v. Hamshaw 41 *a*, 382 *b*
Wagstaff v. Bryan .. [20 *d*]
Wake v. Franklin 91 *f*, [120 *b*]
Wakelin v. Walthall .. 4 *b*
Walbanke v. Sparkes .. [538 *f*]
Walburn v. Ingleby .. 31 *f*
——— v. Ingilby .. [30 *e*]
Waldron v. Coombe .. 255 *a*
Wales, Princess of, v. Lord Liverpool .. 37 *c*, 39 *b*, 44 *e*
Walford v. Stainthorpe .. [36 *c*]
——— v. Walford .. [220 *f*]
Walker, *Ex parte* .. [428 *f*]
——— v. Beauchamp [167 *f*, 268 *c*, 269 *f*, 307 *e*, 323 *a*]
——— v. Corke .. [45 *g*]
——— v. Symonds 199 *a*, 536 *g*
——— v. Walker .. 290 *a*, 291 *b*, [282 *c*]
——— v. Wildman 380 *a*, [39 *g*]
——— v. Wingfield [74 *d*, 339 *b*, 167 *f*, 317 *f*]
——— v. Witter .. 435 *b*, 446 *f*
——— v. Woodward 240 *c*, [533 *c*]
Wallace v. Wallace .. [27 *a*]
——— v. Pomfret .. [294 *b*]
Wallis v. De Lancy 178 *b*, 252 *d*
——— v. Hodgson 182 *a*, [180 *b*]
Walmesley v. Child .. 539 *c*
Walpole, Lord, v. Oxford, Lord 232 *d*, [282 *c*]
Walter v. Hodge .. [232 *g*]
——— v. Holman .. [312 *e*]
Walters v. Lewis .. [315 *a*]
Walton v. Hobbs .. 4 *d*
——— v. Shelly 346 *e*, 348, 385 *b*
——— v. Walton .. [294 *c*]
Ward v. Blount .. 495 *c*
——— v. Bucks, Duke of 232 *a*
Page
Ward v. Eyles .. 189 *d*, [195 *d*]
——— v. Garnons 271 *b*, [270 *b*]
——— v. Pomfret 309 *k*, [171 *d*, 261 *c*, 312 *e*]
——— v. Suffield .. [273 *d*]
——— v. Sykes .. [143 *b*]
——— v. Wells .. 253 *a*
——— v. Wilkinson .. 349 *b*
Wardell v. Dent .. 87 *d*, 101 *c*
Warner v. Harding .. 242 *b*
Warren v. Anderson [265 *c*, 266 *g*]
——— v. Bowles .. 252 *e*
———, *Ex parte* .. [153 *a*]
——— v. Grenville .. 309 *k*
Warriner v. Giles .. 167 *d*
Waterton v. Croft .. 401 *f*
Watkins v. Fursland .. [258 *g*]
——— v. Watkins 233 *e*, 333 *d*
Watkyns v. Watkyns [208 *b*, 472 *a*]
Watmore v. Dickenson .. 205 *c*
Watson's case .. 86 *f*
Watson v. England [250 *c*, 483 *a*]
——— v. Lindsel .. [355 *d*]
——— v. Moore [187 *c*, 466 *c*]
——— v. Wace .. 462 *a*
Watts v. Lyons .. [465 *a*]
——— v. Thorpe .. 310 *a*
Watt v. Grove .. 288 *e*, [390 *a*]
Waugh v. Land .. 354 *e*
Way, *In re* .. [542 *c*]
Weall v. Rice .. 298 *b*, and *g* [282 *c*, 515 *a*]
Weaver v. Earl of Meath .. 84 *e*
Webb v. Page .. [101 *e*]
——— v. Petts .. 306 *k*
——— v. Rorke .. 524 *b*
———, Warren d. v. Grenville 309 *k*
Webber, Doe d. v. Lord Thynne 453 *e*
Weeks v. Sparke 305 *c*, 306 *e*, and *g*, 307 *c*
Weguelin v. Weguelin .. [143 *c*]
Weller v. Governors of the Foundling Hospital .. 356 *c*
Wellington v. Wellington 301 *d*
Wells v. New Coll. Ox. .. [309 *b*]
——— v. Williams .. 400 *b*
——— v. Wood .. [18 *c*]
Westlake v. Collard .. 459 *d*
Westmeath, Ld., v. Salisbury [535 *a*]
——— v. Westmeath [544 *b*]
Weymott, *Ex parte* .. 83 *e*
Weymouth v. Roger [338 *g*, 340 *d*]
Whaley, *Ex parte*, and *re* [544 *b*]
——— v. Norton .. 231 *b*
Wharton v. Wharton .. 149 *c*
Wheat v. Graham [336 *e*, 359 *c*]

Page

Wheeler v. Alderson .. [472 *a*]
——— v. Lowth .. 162 *e*, 163 *c*
——— v. Trotter .. 234 *b*
Whelfdale's case .. 406 *c*
Whish v. Hesse .. [472 *a*]
Whitaker v. Newman .. [184 *d*]
——— v. Wright [203 *e*, 507 *b*, 513 *d*]
White v. Beard .. [398 *f*]
——— v. Cayley .. 345 *e*
——— v. Fussell .. 208 *g*, and *k*, 213 *f*, 536 *k*, [58 *e*, 205 *b*, 207 *a*, 208 *i*, 209 *a*, 537 *b*]
——— v. Hillacre .. [138 *c*]
——— v. Lisle .. 523 *f*, 527 *f*
——— v. Prose .. [395 *b*]
——— v. Taylor .. 59 *b*
——— v. Wilson 56 *a*, 496 *f*, [233 *b*, 331 *d*, 390 *a*]
Whitechurch v. Golding .. 538 *b*
Whitehouse v. Abberley .. [465 *b*]
——— v. Partridge .. [478 *b*]
Whitelock v. Baker 77 *a*, 104 *f*, 140 *b*, 220 *e*, 321 *b*, 323-4, [221 *i*, 317 *f*]
Whitfield v. Faussett [12 *a*, 269 *d*, and *f*]
——— v. Tutin [273 *d*, 274 *a*]
Whitmore v. Francis 81 *d*, 83 *g*
——— v. Graham .. 437 *b*
——— v. Wills .. 352 *a*
Whitton v. Russell [277 *a*, 278 *a*]
Whittuck v. Lysaught [71 *b*, 106 *e*, 223 *e*]
Whitworth v. Golding .. 539 *d*
Whotton v. Russell [277 *a*, 278 *a*]
Wigsell v. Wigsell .. 478 *c*
Wiley v. Pistor .. 45 *a*, 192 *e*
Wilford v. Beaseley .. [195 *d*]
Wilker v. Bodington .. 85 *a*
Wilkins v. Stevens .. [474 *f*]
Wilkinson v. Adams .. 302 *g*
——— v. Allott .. [306 *g*]
——— v. Bell .. 50 *d*
——— v. Gordon .. [433 *d*]
——— v. Payne 485 *d*, 486 *a*
Wilan v. Wilan 198 *g*, 505 *a*, and *b*, 511 *d*, 513 *d*, [203 *e*]
Williams v. Broadhead 195 *a*, 260 *c*, [261 *c*]
——— v. East India Co. 249 *a*, and *d*
——— v. Goodchild 199 *e*, 536 *f*, *g*, and *h*
——— v. Geary .. [391 *b*]
——— v. Greaves .. [310 *d*]
Williams v. Hall .. [388 *c*]

Page

Williams v. Johnson .. 344 *e*
——— v. Jones .. [294 *c*]
——— v. Knight .. [259 *a*]
——— v. Knipe .. [152 *b*]
——— v. Lamb .. 85 *f*
——— v. Llewellyn 231 *f*, [289 *c*]
——— v. Lonsdale .. [390 *a*]
——— v. Nunn .. 353 *c*
——— v. Wilcox [169 *c*, 269 *f*]
——— v. Younghusband 270 *d*
Williamson v. Harrison .. 242 *d*
——— v. Hutton 197 *b*, 199 *f*, 536 *k*
——— v. Lonsdale, Ld [390 *a*, 246 *a*]
Willington v. Browne .. [462 *b*]
Willis v. Farrar .. [312 *e*]
——— v. Gabbut .. 110 *a*
Wilson v. Allen .. 480 *d*
——— v. Hodges .. 474 *c*
——— v. Metcalfe .. 522 *b*
——— v. Rastall .. 381 *d*, 383 *f*
——— v. Rogers .. 170 *c*
——— v. Squire .. [286 *b*]
——— v. Wilson .. [123 *a*]
Winch v. Winchester .. [291 *d*]
Winchester, Bp. of, v. Fournier 379 *a*
Winpenny v. Courtney [145 *g*, 512 *c*, 513 *d*]
Winter v. Bickley .. [138 *c*]
——— v. Dancie .. [127 *a*]
Winterbotham v. Ingram [501 *a*]
Wishaw v. Barnes .. 349 *d*
Withers's case .. 397 *c*, 400 *m*
Withnell v. Gartham .. 281 *a*
Witts v. Campbell .. 339 *f*
Wollam v. Hearn 290, 291 *a*, [289 *a*]
Wollarton v. Hakewell .. [419 *c*]
Wolley v. Brownhill [167 *d*, 312 *e*, 371 *c*, 372 *c*, 429 *a*]
Wolmsley v. Child .. 539 *c*
Wood v. Braddick .. 29 *f*
——— v. Cooper .. [174 *a*, 220 *k*]
——— v. Griffith .. 536 *e*
——— v. Hammerton 207 *a*, [208 *i*]
——— v. Harper .. [542 *a*]
——— v. Staine .. 181 *d*
——— v. Strickland .. 173 *c*, [10 *e*, 211 *c*, 274 *a*]
——— v. Teague .. 361 *c*
Woodcraft v. Kynaston .. 412 *a*
Woodgate v. Field .. [196 *b*]
Woodhead v. Boyd .. [114 *g*]
Woodhouselee, Lord, v. Dalrymple [284 *b*]
Woodmas v. Mason .. 414 *a*
——— v. Warner .. 124 *a*

	Page
Woodroffe v. Daniel ..	[46 *c*]
——— v. Titterton .	[502 *b*]
Woods v. Woods ..	[248 *a*, 317 *f*, 457 *a*]
Wormold v. Mackintosh ..	203 *b* [346 *d*, 348 *b*, 355 *b*, 359 *c*]
Worrall v. Jones ..	[337 *b*]
Wortley v. Birkhead ..	422 *a*
Worts v. Pearu ..	271 *b*
—— v. Peru ..	[271 *b*]
Wright v. Littler ..	315 *c*
——— v. Netherwood ..	488 *a*
——— v. Pilling ..	536 *c*
——— v. Wardle ..	362 *a*
Wrottesley v. Bendish	28 *d*, and *g* [22 *c*, 28 *e*, 428 *a*]
Wyatt v. Bateman	[263 *e*, 265 *a*]
Wycherley v. Wycherley ..	364 *b*
Wyld v. Ward ..	199 *k*, 536 *g*
Wynne v. Middleton ..	150 *c*

Y.

	Page
Yallop, *Ex parte* ..	[419 *d*]
Yardley v. Arnold ..	[343 *b*]
Yates v. Hardy ..	520 *e*
Yeast v. Barber ..	[90 *b*]
York v. Haidon ..	[339 *b*]
—— A. B. of, v. Stapleton	[236 *e*]
Yorke v. Brown ..	[156 *b*]
Young v. Bairner ..	373 *b*
——— v. Honner ..	[267 *b*]
——— v. Richards ..	[141 *a*]
——— v. Young ..	289 *g*
——— v. Wright ..	48 *c*

Z.

	Page
Zepherina Lima ..	[445 *k*]

THE

LAW OF EVIDENCE

IN THE

Courts of Equity. (a)

INTRODUCTORY CHAPTER.

EVIDENCE in the Courts of Equity, although materially differing in its character and in many of its rules from that which is used in the Courts of Common Law, is scarcely less extensive as a subject for dissertation.

There are some causes certainly which tend to confine it within a narrower compass.

In the first place its ulterior objects are more limited. In trials at law, crimes, damages, and an infinity of various matters, are the issues towards which the evidence must be directed; but these are, generally speaking, excluded (*b*) from tribunals whose jurisdiction may be comprehended under a few such heads as "fraud, trust, and accident." (*c*)

It is also in some degree circumscribed by the different nature of the tribunals themselves, and the distinct character of their forms of proceedings. Matters are frequently brought into the Nisi Prius Courts, on which there can be no question in the minds of the Judge or the Bar as to the proper verdict, [2] yet a great latitude is allowed for the production of evidence

(*a*) [When Mr. Gresley wrote this work, not only the Court of Chancery but the Court of Exchequer also had one side for taking cognizance of cases in equity.]

(*b*) Not absolutely; Lord Hardwicke, C., in Harrison *v.* Southcote, 2 Ves. sen. 393, says "The general rule is, that penal laws are not to be taken or construed *by* equity;" but [although sitting *in* equity] he proceeds immediately to determine a point of criminal law: and Lord Eldon, C., in Cartwright *v.* Green, 8 Ves. 409, after consulting with several judges, decided a very nice question of felony. See also Claridge *v.* Hoare, 14 Ves. 65.

(*c*) See 1 Mad. Chan. Pr. 23.

which may influence the feelings and prejudices of the inexperienced and irresponsible jury. But an equity suit, which is to be deliberately decided by calm reason alone, usually contains points of real legal difficulty, and depends upon the close application of principles to the main facts of the case. Consequently much discursive matter, (and especially almost all that is addressed to the passions,) is pruned away from the evidence in equity;—so much so that many suits are decided upon mutual admissions alone. Again, the conduct of witnesses in delivering their testimony, in Courts of Law, has often a considerable effect, all which of course is lost when the answers are written on paper. Topics, therefore, of which the point consists in exposing to the jury the secret feelings of an unguarded witness, such as those which lead him to betray party spirit, or a hope of some remote personal advantage would be wholly misplaced in an examination in equity.

Other branches of evidence are curtailed by the laxity of practice in equity, as compared with the strictness of common law. For instance, in former treatises Variance is a head under which a mass of rules and cases will be found collected. But as in Courts of Equity there is both a reluctance to admit the importance of a mistake or inaccuracy, and a readiness to allow the flaw to be remedied by amendment, the objection is seldom taken. It will therefore be sufficient for our present purpose to state briefly the general principles that may be deduced from those rules and cases, and to point out the few instances in which there is any prospect of their being useful.

But on the other hand, when any investigation has been
[3] fairly entered upon in equity, it leads into innumerable ramifications, with a minuteness almost inversely proportioned to the limited number of the main subjects of inquiry. For example, a dispute concerning a trust requires due proof of deeds and wills, and thence may lead to questions of forgery or conspiracy, and trench upon the criminal jurisdiction; a tithe-cause comprehends, more fully than almost any other kind of trial, questions on the admissibility of ancient documents and of hearsay, and may also involve some of the minutest points of ecclesiastical law.

Thus, though evidence is generally employed in Courts of Equity upon different kinds of subjects from those in the Courts of Law, yet there are few legal proceedings which may not sometimes, incidentally, be brought before the notice of an Equity Judge, and consequently few points of the Law of Evidence from the knowledge of which Counsel practising in Equity may not derive advantage.

It will therefore be necessary for us to take a general survey of the Law of Evidence; omitting however those few topics which are confined to the Courts at Law, and dwelling at large on those which are peculiar to the Courts of Equity (*a*).

Equity follows the law.

There is one fundamental principle relating generally to the whole subject of our Treatise, upon which it will be useful to make a few observations before we proceed, namely, the rule that Equity follows the Common Law. [Or rather, that Courts called Courts of Equity administer justice according to the Common Law, where such law is applicable to the case before them, adopt its general rules, recognise its established sources, foundations and maxims, and, so far as possible, even its arbitrary rules, as well as those more obviously founded on right reason.]

The maxim *æquitas sequitur legem* applies emphatically to this branch of law. [That is, to the law of evidence in Courts of Equity; which is generally identical with the law of evidence in Courts of Common Law; and generally speaking, that is proof, or sufficient evidence, in one which would be in the other.] In fact the whole system of evidence in the Courts of Equity is an engrafting of the rules established amongst English lawyers upon the forms used by the Civilians. Accordingly we find that on several points it had formerly a greater similarity, in substance as well as form, to the civil law, and that the practice has arrived by degrees at its present

(*a*) [The House of Lords, on appeals from the Courts of Chancery of England and Ireland, is *quasi* a Court of Equity; and the same rules as to evidence prevail in that as in other Courts. See a Dissertation on the subject by Mr. E. Christian.]

[4] state, in which [in general] every common law decision is considered as a binding authority. (*a*)

Number of witnesses.

Thus in cases where a material fact was directly put in issue by the answer, the Courts of Equity followed the maxim of the civil law, *responsio unius non omnino audiàtur*, and required the evidence of two witnesses as the foundation for a decree.(*b*) But of late years the rule has been referred more closely to the equitable principle on which it is grounded, namely, the equal right to credit which a defendant may claim when his oath, "positively clearly and precisely" given, and consequently subjecting him to the penalties of perjury, is opposed to the oath of a single witness. (*c*) When this is the case some corroboration is required—the testimony of a second witness or any circumstances which may give a turn to the balance. (*d*) The

(*a*) [See Manning *v.* Lechmere, 1 Atk. 453; Man *v.* Ward, 2 Atk. 229; Glynn *v.* Bank of England, 2 Ves. 41. Hence arises the necessity, or at least propriety, of reference to so many cases decided at law: it is hoped this may prevent doubt arising in the Courts of Equity on such points as are thus decided.] On one subject indeed, that of legacies, Sir John Leach expressed his readiness to follow implicitly the rule of the Ecclesiastical Courts, if they could in that instance have furnished him with one, and he directed a case, as to the admission of parol evidence, to be sent for that purpose to two civilians; *vid. inf.* P. II. ch. 3, § 2. On that subject Lord Hardwicke says, "Where the legacy is merely personal, the Court follows the rule of the civil law, because personal legacies are properly cognizable in the Ecclesiastical Court; and Equity has always considered itself as bound to follow the rules of that Court, to which the jurisdiction properly belonged;" Reynish *v.* Martin, 3 Atk. 333; [and see on the same subject, Hunt *v.* Beach, 5 Mad. 360. That, conversely, the Courts Christian adhere to the rules as to evidence which prevail in the other Courts of this realm, see Conway *v.* Beazley, 3 Hag. R. 651; and as to the Admiralty Court, see the case of the Hauber Giertson, 6 C. Rob. 55. The application, by the Court of Chancery of England, of the rules of law in England to questions arising, on a mortgage of land, at Demerara, see in Bentink *v.* Willink, 2 Hare, 1; and, at Jamaica, in Tulloch *v.* Hartley, 1 Yo. & C. 114.]

(*b*) Wakelin *v.* Walthall, 2 Ch. Ca. 8; Bath *v.* Mountague, 3 Ch. Ca. 123; Hobbs *v.* Norton, 1 Vern. 137; Alam *v.* Jourdan, 1 Vern. 161; Kingdome *v.* Boakes, Ch. Pre. 19. [Christ's Coll. *v.* Widdrington, 2 Vern. 283; Glynn *v.* Bank of England, 2 Ves. 38; Reeks *v.* Postlethwaite, Coop. 161.] In Mortimer *v.* Orchard, 2 Ves. 243, a witness swore to an agreement, two defendants admitted an agreement but stated the terms of it differently; Lord Loughborough, somewhat unwillingly, granted a decree, but it was for a performance of the agreement as stated by the defendants.

(*c*) [*Vide infra*, p. 5, n. (*b*). How much more now that the stat. 6 & 7 Vict. c. 85, cited fully below, has let in the testimony of those whom the common law heretofore deemed so unworthy of credit as to be not competent to testify.]

(*d*) Walton *v.* Hobbs, 2 Atk. 19; Janson *v.* Rany, 2 Atk. 140; [Pember *v.* Mather, 4 Bro. C. C. 52]; Le Neve *v.* Le Neve, 3 Atk. 649, 1 Ves. 66, Ambl. 440; Arnot *v.* Biscoe, 1 Ves. 97; Reech *v.* Kennegal, 1 Ves. 125; Mortimer *v.* Orchard, 2 Ves. 243; Lord Cranstoun *v.* Johnston, 3 Ves. 179; Cooth *v.* Jackson, 6 Ves. 39; Evans *v.* Bicknell, 6 Ves. 184; [Lindsay *v.* Lynch, 2 Sch. & Lef. 1]; Pilling *v.* Armitage, 12 Ves. 80; [Dawson *v.* Massey, 1 Ball & B. 234]; Cooke *v.* Clayworth, 18 Ves. 17; [Savage *v.* Brock-

corroboration however has been sometimes so extremely slight, that although the fact of the defendant's being an interested, [5] and therefore at Common Law an incompetent, witness is professedly dismissed from the mind of the Court, (*a*) still there can be little doubt but that this circumstance has a considerable weight. (*b*)

sop, 18 Ves. 336]; Toole *v.* Medlicott, 1 B. & B. 402; [E. I. Company *v.* Donald, 9 Ves. 584]; Biddulph *v.* St. John, 2 Sch. & Lef. 532; Morphett *v.* Jones, 1 Swanst. 172; [S. C. 1 Wils. 100]; Kemeys *v.* Proctor, 3 V. & B. 58.

(*a*) Lord Eldon in E. I. Comp. *v.* Donald, 9 Ves. 584. [In which case the defendant being offered an issue and declining it; the Court declared there were circumstances enough to authorize a decree against him; and see S. C. 1 Smith, 213. Similar cases in the Exchequer (then a Court of Equity) see Speed *v.* Martin, 2 Coll. 588; Hughes *v.* Garner, 2 Yo. & C. 328.]

(*b*) [In general in equity, as well as at law, an interested person, whether a party or not, for that reason even, was not admitted to testify prior to the late stat. 6 & 7 Vict. c. 85; but a disinterested person, although a party, was always admissible as a witness in equity; and now no less so if interested, which however is still an objection so far as affecting his credibility, *vide infra.*]

[It may here be in place to observe, that, even at law, on the same principle, one witness in a trial for perjury is not sufficient; unless, indeed, his evidence be supported by circumstantial evidence of the strongest kind; see Champney's case, 2 Lew. Cr. Ca. 258; but of course the taking the oath and the particular facts deposed to may be proved by one witness. Reg. *v.* Muscot, 10 Mod. 195.

With regard to the subject of a necessity, in certain cases, for more than one witness, Chief Baron Gilbert's observations, in his Treatise on Evidence, seem to deserve our consideration, furnishing, as they do, the true principle, worthy of the wisdom and freedom of our forefathers. "There are some cases in law," says the learned Chief Baron, "when the full evidence of two witnesses is absolutely necessary; and that is,—

First, where the trial is by witnesses only, as in the case of a summons in a real action, *for one man's affirming is but equal to another man's denying, and when there is no jury to discern of the credibility of witnesses, there can be no distinction made in the credibility of their evidence*, for the Court (he means of course in this particular case, one of law) doth not determine of the preference in credibility of one man to another, for that must be left to the determination of the neighbourhood; therefore when a summons is not made and proved by *two* witnesses the defendant may wage his law of non-summons;"—citing 2 Hawk. P. C. 256; Bract. 354, b.

"*Secondly*, in Chancery, where there is but one witness contradicting the answer; for there the credibility is equal, unless it appear from the nature and face of the fact, that the answer is not to be believed, and the course of the Court in such case is to direct a *trial at law* to ascertain the credibility of that witness *by a jury; which is the common standard on which the credit of every Englishman is to stand and fall in all events*,"—citing 1 Vern. 161; 2 Vern. 283; 2 Ch. Ca. 123; Eq. Abr. 229, pl. 12, &c."

"*Thirdly*, Treason" (such as worked corruption of blood) and "heresy, formerly reckoned treason," required *two* witnesses, "because," says our Author, "*a court faction might, in many cases, cut off their enemies, on such articles, without a sufficient proof*," and accordingly stat. 7 Wm. 3, c. 3, s. 2, made *two* witnesses necessary to prove any overt act of treason; our Author cites 4 Hawk. P. C. 420; T. Raym. 407, 408; Kel. 9; as to treason, and T. Raym. 408, and H. H. P. C. 410, note (*b*); as to heresy. But that one witness was enough to prove treason when no corruption of blood followed, see Cases C. L. 50; Gilb. on Ev. edit 1801, p. 137. The learned Chief Baron also adverts to the case when, although the trial was by witnesses, one would suffice; the mother of a bastard child to prove the reputed father under stat. 18 Eliz. And here it may perhaps also deserve our passing notice that the bastardy clauses of the modern poor law acts have restored the common law (harsh as in this instance it may seem to some) so far as to require corrobo-

In many instances however, there are important equitable principles with which too close an observance of the common law authorities would interfere. Lord Hardwicke said, on an offer being made to put in the testimony of an *interested* witness, "The rules of evidence at law, and in equity, differ, not in general, but only in particular cases; where fraud is charged by a bill, or in cases of trusts, this Court does not confine itself within such strict rules as they do at law, but for the sake of justice and equity will enter into the merits of the case; in order to come at fraud, or to know the true and real intention of a trust or use declared under deeds. It would therefore," he added, "very much abridge the power and jurisdiction of this Court, which is chiefly conversant in cases of fraud and trusts, if I did not admit the evidence in question." (*a*)

Arbitrary rules sometimes fixed differently.

In other instances there are variances which amount to little more than a different mode of fixing points of minor importance in principle, but necessary to be settled in practice. Thus where an executor admitted in his answer that he had received a sum of money from the testator, but further asserted that 100*l.* of it had been given to him as a present, then if the former statement were relied on by the plaintiff, the latter also would [if the answer were read as evidence] at law, be evidence

rative evidence in addition to the mother's oath. See stat. 4 & 5 W. 4, c. 76, and R. v. Read, 1 P. & Dav. 413. That *one* witness is sufficient to prove a contempt of the Court of Chancery, see Sands v. Knighton, Toth. 41; see also Hammond v. Shelley, 2 Ch. Ca. 100, although in a later case, when a contempt had been proved by the oath of *one* witness only, the Court showed some lenity. Anon. 3 Atk. 219.] Further on the subject of single evidence, *vide inf.* P. II. ch. 2.

(*a*) Man v. Ward, 2 Atk. 229. And see Lupton v. White, 15 Ves. 443. [And as to the Chancellor of Ireland also being not confined, in all cases, to the strictest rules of legal evidence, see Kilbee v. Sneyd, 2 Moll. 193. And how very slight evidence will move the Court against a wrong doer, *in odium spoliatoris*, see Childerns v. Saxby, 1 Vern. 207. On the other hand how, in compassion for an unfortunate accounting party, who from lapse of time or accident may be unable to prove every item of his account by strict evidence rigidly scanned, the Court will sometimes impose terms upon the plaintiff as to evidence; see Holtscombe v. Rivers, 1 Ch. Ca. 127; Peybon v. Green, 1 Ch. Rep. 146; and see Darston v. Earl of Oxford, Coll. Prec. Ch. 188. Whilst conversely again, in the Exchequer (in Equity) on taking an account of the pecuniary transactions between an attorney and his client, the production of a bond entered into by the latter, was held to be not *sufficient* evidence of a debt to that amount; and actual payment was required to be proved; Lewes v. Morgan, 3 Y. & J. 230; and, as further proof of the discretion exercised by the Court, the evidence necessary as to finding deeds after a decree, has been held to be such only as the Court may think reasonable; Llewellyn v. Mackworth, 2 Atk. 40; S. C. Barn. 445.]

for the defendant, on the principle that "if a man was so honest as to charge himself when he might roundly have denied it, and no testimony could have appeared, he ought to find credit where he swears in his own discharge (*a*): But it was answered, and resolved by the Lord Chancellor, (Cowper,) that where an answer was put in issue, [*i. e.* issue properly joined thereon in the Court] what was confessed and admitted need not be proved, but it behoved the defendant to make out by proofs what was insisted on by way of avoidance,—because it [6] was not improbable that he admitted it out of apprehension that it might be proved, and therefore such admittance ought not to profit him so far as to pass for truth whatever he said in avoidance." (*b*) Here the arguments on both sides being of nearly equal weight, it is to be regretted that the rules should have been established differently. (*c*)

Law sometimes follows equity.

Sometimes a sort of re-action has taken place and the Courts of Law have adopted the practice of those of Equity, for the sake of saving to the suitors the necessity of applying to another jurisdiction. (*d*) There are even cases in which the rules of law with respect to evidence have been altered under a mistaken view of the practice in Equity. When this has occurred the Courts of Equity have not thought it necessary to fall into the new line, but have adhered to their former course. It was for several years "the constant practice of the Court of King's Bench to grant rules for inspecting the books of a corporation, as matters of course," (*e*) and this was done under an impression that the Courts of Equity would always have been ready to compel a discovery; but the Courts of Equity maintained the ground which they had originally taken, namely, to

(*a*) [That the whole of an admission in an answer is to be read, *vide infra.*]

(*b*) Anon. 1707, Gilb. on Ev. 52, [or p. 45, ed. 1801.] But admissions of this sort in answers have lately been placed on sounder principles, *vide infra*; and see further on this subject, *infra*, P. III. ch. 3.

(*c*) [If indeed they do at all differ. The distinction in this case seems to be not between the rules or practice as to evidence in Courts of Law and Equity, but rather between rules of pleading and those of evidence; see the observations on this instance of it, by Mr. Evans, in his notes to the work of M. Pothier, vol. 2. pp. 157-8. See also the discussion of this very case, and strictures on the remarks of Mr. Evans, in a note to Serjeant Peake's work on the Law of Evidence, p. 56, 5th edit., to which latter work, for brevity sake, we must refer the curious reader.]

(*d*) [Analogous to the desire of the Ecclesiastical Courts and Courts of Admiralty, to adopt the same rules, as to evidence, as those used by the Courts of Law. *Vide Sup.* p. 4, n. (*a*).]

(*e*) Grose, J., in Mayor of Southampton *v.* Graves, 8 T. R. 594.

refuse an inspection to strangers while they granted it to all connected with the corporation. (*a*) Eventually the Court of King's Bench altered its practice and conformed exactly to that of the Court of Equity. (*b*)

Disputed evidence.

Evidence which would have been rejected at Law has sometimes been inconsiderately admitted in Equity, upon a principle which is in truth very unsound and dangerous, but which often affords an immediate relief from a difficulty: it is when the Court allows disputed evidence to be read, at the same time either openly or tacitly determining to let it have no weight. Thus when certain documents were strongly objected to, Powell, J., (sitting in Chancery,) cut the knot by saying, "I will [7] not hinder you from reading, for though at law it is not to be allowed, where a jury may be inveigled by that which is not proper evidence, yet here there is no such danger." It is added, "So the proofs were read, but he would not decree the trust."(*c*)

Arrangement of the work.

Having premised these observations on a preliminary point, we will proceed to the main subject of our Treatise. The arrangement which appears the most practicable, and therefore probably the most convenient, will be, to advance step by step through the principal stages of a suit; to consider first the mode in which evidence is collected by the parties; next to discuss the rules which exclude certain kinds of evidence if tendered (*d*); and then to examine it in its perfect state as it is presented to the mind of the Judge who hears the cause. (*e*)

When differences occur between the practice of the Court of Chancery and that of the equity side of the Exchequer, they will be pointed out (*f*); but except in a very few instances, what is asserted of one may be safely applied to both.

(*a*) *Vide infra*, ch. 3, § 5.

(*b*) Mayor of Southampton *v.* Graves, 8 T. R. 590.

(*c*) Newton *v.* Preston, Ch. Pre. 104, [*et vide infra*, a case of Scott *v.* Edwards, Jan. 1835, cited by Mr. Gresley from his own note.]

(*d*) [A part of the subject on which stat. 6 & 7 Vict. c. 85, comes to be fully noticed.]

(*e*) [Or the master to whom the matter is referred by the Court.]

(*f*) [By stat. 5 Vict. c. 5, s. 1, (passed subsequently to the publication of the first edition of this work, and already alluded to above) the power, authority, and jurisdiction of the Court of Exchequer, as a Court of Equity, has been transferred to the Court of Chancery.]

PART THE FIRST. [8]

THE MEANS BY WHICH THE PARTIES PREPARE THEIR EVIDENCE.

[Supposing the cause comes to an issue, Demurrers and Pleas all overruled.]

When the Answer has been put in, and the statement and counter-statement are now both upon the record, the next care of the parties is to prepare their proofs.

Of some matters which may be used in evidence judicial notice will be taken by the Court: these will be discussed in a subsequent chapter. The rest must fall under one or other of the three following heads:—Admissions in the Pleadings; Admissions made by agreement;—Evidence produced by Witnesses. We will proceed to consider each of these in their order.

CHAPTER I.

ADMISSIONS IN THE PLEADINGS. (*a*)

The Statements in the Bill may be ranked among admissions, though perhaps they are not quite properly so called. They are in truth the exposition of the case on which relief is sought; and to refer to them is exactly similar to using the argument *ex hypothesi* in logic. In practice they are less useful to an [9]

In the bill.

(*a*) The matters contained in this section are connected very closely with the rules under which Discovery is enforced in equity. The writer had, in common with others, felt the want of a book of reference on this subject, and he had collected materials for an attempt to supply the deficiency, so far at least as it bore closely upon the preparation of evidence in a Chancery suit. That necessity has now been amply superseded by the publication of Mr. Wigram's able and luminous work on certain "Points in the Law of Discovery," and Mr. Hare's elaborate "Treatise on Discovery of Evidence by Bill and Answer in Equity."

opponent than those contained in the answer, because, not being on oath, they frequently give a garbled version of the truth, misrepresented so as to suit the purposes of the plaintiff. (*a*) In one instance they are more binding than admissions in the answer; when an infant is plaintiff the Court will often make a decree, without a reference, upon statements which if they were in an infant's answer would be referred to the Master to inquire into. (*b*) There is consequently sometimes an advantage in making an infant the plaintiff, as in an amicable suit instituted for the purpose of family arrangements. (*c*)

In a demurrer or plea.

A Demurrer admits all the facts stated in the bill to be true, a Plea admits all that it does not contradict; (*d*) but these admissions are merely for the purpose of trying the validity of the demurrer or the plea. (*e*)

In the answer.

The Answer meets every point *seriatim*, (*f*) and being on oath (*g*) and compulsory, is affected in a greater or less degree

(*a*) [The very frame of the bill itself should, if possible, be such as to draw from the defendant such an answer as shall, as much as possible, preclude the necessity for evidence. In the Ecclesiastical Courts also, the use of answers is to save the necessity of taking evidence; see remark of Sir John Nicholl, in Clutton *v.* Cherry, 2 Phill. R. 385. And that such was the use of the answer in the Court of Exchequer when one side was a Court of Equity; see Neale *v.* Marlborough, D. of, 2 Yo. & Col. 3.]

(*b*) [The answer of the guardian of an infant cannot be read against his ward; Leigh *v.* Ward, 2 Ventr. 72, *secus*, as to the guardian of one not an infant; Leving *v.* Caverley, Pr. Ch. 229.]

(*c*) [As to amendment of the bill, *vide infra*. How far statements in a bill in Chancery, not taken *pro confesso*, may be available at all; see Metcalfe *v.* Ines, 1 Atk. 63; Handeside *v.* Brown, Dick. 236; Hales *v.* Pomfret, Dan. 141; Ryan *v.* Anderson, 3 Mad. 174; Kilbee *v.* Sneyd, 3 Moll. 207, *et vide infra*.]

(*d*) Mitf. on Pl. 107. 300.

(*e*) [With respect to demurrers and pleas in general, see the Ord. of May, 1845, Nos. 44 to 50 inclusive; after those of Aug. 1841, 36 and 37. As to demurrers, see also Ord. of May, 1845, 16, 17, and 18; and as to pleas, ibid. 19; and as to demurrers, Ord. of May, 1837, 6; as to pleas, Ord. of May, 1845, 13, 14, 15, 16, and 19.

A plea being found false, plaintiff is entitled to a decree; and, if discovery be necessary, to examine defendant on interrogatories; Wood *v.* Strickland, 2 V. & B. 158. But as to examination of defendant, *vide infra*.]

(*f*) [At least every point as to which the defendant is expressly interrogated; for now, see the Ord. of 26th Aug. 1841, Nos. 16, 17, 18, and 19; which have very greatly altered the forms both of bills and answers in this respect. Sand. Ord. 879-80.]

(*g*) A Peer answering upon honour is in exactly the same situation as another defendant answering on oath; Gilpin *v.* Lady Southampton, 18 Ves. 469. [As to the right to answer *on honour*, and how claimed by the House of Lords, see their resolution in 16 Car. 1, Sand. Ord. 207, and an Ord. by the House, in 1 Jac. 2, ibid. 365. On the case of a Peer being also a Sovereign Prince; see Brunswick, D. of *v.* Hanover, K. of, 6 Beav. 1. The present King of Hanover being Duke of Cumberland, &c. As to the cunning devices at one time used by "persons that went under the name of Quakers," to avoid swearing to their answers; and the remedy rendered ne-

by most of the rules and incidents to which the evidence of witnesses is liable. (*a*) There are also certain peculiarities of its own, such as the privilege that exceptions cannot be taken to the answer of an infant, or of the Attorney General, but as these belong more properly to the province of pleading, and are discussed in Lord Redesdale's treatise, (*b*) they will be passed over here.

Evidence procured from admissions in the answer is generally less expensive, and often more convenient, than if it were obtained from witnesses; (*c*) and it has the further advantage [10] of being conclusive,—that is, of acting as an estoppel to the introduction of conflicting testimony. (*d*) There is also a greater readiness on the part of the Court to order the production of documents if they can be brought before its notice by an admission, that if they are merely spoken of by a witness. (*e*) And there are certain issues, such as the validity of a probate, which may be admitted, but cannot in any other

cessary, see an Ord. of Court, 28 Car. 2, in Sand. Ord. 348; somewhat curious if otherwise valueless. Pleas, answers, &c. may be sworn before a Clerk of Records and Writs, &c., Ord. Oct. 1842, No. 7. Sand. Ord. 917.]

(*a*) The same observation applies to a plea in bar of matters *in pais* which is also required to be on oath.

(*b*) Mitf. on Pl. Ch. 2, s. 2, part 3.

(*c*) For instance, an admission that the defendant is personal representative, saves, to the plaintiff, the necessity of putting in the probate copy of the will; which he would otherwise be obliged to prove, and which would thereupon, without further proof, be evidence for the adverse party.

(*d*) E. I. Co. *v.* Keightly, 4 Mad. 16. In one case even where the defendant, an executor, had admitted assets by mistake, Roberts *v.* Roberts, Dick. 573. But see Dagley *v.* Crump, Dick. 35; and Parteriche *v.* Powlett, 2 Atk. 383. Depositions of witnesses to furnish further proof of points admitted in the answer are impertinent; *vide infra*, P. II. Ch 3, § 1.

[On behalf of the defendant his answer cannot be used as any evidence of the facts, although by him sworn to; yet, being on oath, he is allowed to read from it what may serve his purpose upon the question of costs; Howell *v.* George, 1 Mad. 13. And so where it is the answer of a peer on honour; Dawson *v.* Ellis, 1 J. & W. 524. Whether the rule extends to an answer of a corporation being, as it is, merely under the seal of such corporation, or an answer of an individual without oath or signature, is not decided, and it seems by no means to be fairly to be inferred.]

(*e*) [When a defendant by his answer admits a document set out in the bill to be "to the purport or effect set out, &c." but "craves leave for his greater certainty, &c. to refer to the same," the plaintiff need not, on that ground merely, reply to the answer, but may set the cause down for hearing on bill and answer, and obtain an order to prove the document *viva voce* at the hearing, provided it be such a document as, by the rules of the Court, can be proved in that manner; see 2 Dan. Pr. Ch. 398, citing Fielder *v.* Cage, Prac. Reg. 219; and Dan. Pr. Ch. 2nd ed. pp. 803 and 841. And it has been held, that instruments, neither admitted nor denied by the answer, may be proved (at the hearing) *vivâ voce*, although the cause is heard on bill and answer, without replication; Rowland *v.* Sturgis, 2 Hare, 520.]

way be proved before a Court of Equity. (*a*) Above all, an opportunity is afforded of cross-examining the persons most interested and probably most fully acquainted with the facts.

Cross bill, its use.

These propositions for the most part apply equally to the statements in the bill, except the last, with regard to which it should be remembered that the defendant has it in his power to obtain the like advantage by filing a cross-bill, which is, by the fiction of another suit, a cross-examination of the plaintiff or of a co-defendant. (*b*)

Questions put by the bill.

Practitioners of the longest and most extensive experience (*c*) speak most strongly in favour of this mode of eliciting proof. It is unquestionably the only part of the proceedings in equity at all equivalent to the cross-examination of the Common Law Courts, for it is the only opportunity given for repeating in various forms a question skilfully evaded, or for pursuing a vein of truth which such question has discovered. (*d*)

Compared with *viva voce* cross-examination.

The superiority of the *viva voce* cross-examination in an attempt to extract the truth from an unwilling witness, has been frequently dilated upon. The very just remarks of C. J.

[11]

(*a*) Sheffield *v.* Duchess of Buckinghamshire, 1 Atk. 630. [The further advantage of an admission in the answer, as letting in secondary evidence, see in Whitfield *v.* Faussett, 1 Ves. sen. 387; Crosse *v.* Bedingfield, 12 Sim. 35; and in other cases, see also Spurrier *v.* Fitzgerald, 6 Ves. 548; Mullins *v.* Pratt, Bunb. 6. And the great importance of the statements contained in the answer in cases where the plaintiff desires to move the Court to have accounts taken, or other preliminary inquiries made before the hearing under Ord. of May, 1839, No. 5. See Sand. Ord. 852, will be obvious.]

(*b*) There was a memorandum among Sir S. Romilly's papers that it would be an improvement if the Court had the power of giving leave to a defendant to examine a plaintiff on interrogatories before the master, so as to save the necessity of his filing a cross bill; see Mr. Vizard's evidence, App. to Ch. Com. 54, Q. 266.

[As to the costs of cross bills, see Ord. of 26th of Aug. 1841, No. 41. Sand. Ord. 885, and Ord. of 8th of May, 1845, No. 125. Sand. Ord. 1020. "Where a defendant files a cross bill for discovery only, the answer may be read and used, by the party filing such cross bill, in the same manner and under the same restrictions as the answer to a bill praying relief, may now be read and used. Ord. of 20th Aug. 1841, No. 42. Sand. Ord. 885. As to publication in a cross suit, *vide infra*, *et vide* Palmer *v.* Leycester, 6 Sim. 610.

As to the power of examining a party to the cause saving all just exceptions, *vide infra*, and how far such exceptions still exist, *vide* stat. 6 & 7 Vict. c. 85. For improving the law of evidence, *post*.]

(*c*) See the evidence of Mr. Bell, in the Report of the Chancery Commission, App. p. 4, Q. 25, &c.; of Mr. Lowe, p. 165, Q. 63, &c.; and of others.

(*d*) [By amending as occasion requires. The right of the plaintiff to have an answer, sufficient as well as on oath, is enforced by the process to which we shall have occasion to advert, of taking exceptions for insufficiency as often as occasion may require, until he has an answer full, at least, if not useful. The detail of this course is matter of practice.]

Wilmot are often quoted, (*a*) in which he speaks of "the benefit of a *vivâ voce* examination where the looks, the manner, and deportment of the witness, are extremely material to confirm or discredit his testimony;" and he adds, "it is found by the experience of ages that nothing does so effectually explore the truth as a cross-examination, which strikes so suddenly that fiction can never endure it."

Advantages.

The advantages however of the mode pursued in equity have not been properly appreciated.

In the former, very much depends upon the presence of mind of the counsel, who must first exert his skill to throw the witness off his guard, and then, before he recovers himself, must press home every point of inquiry, which circumstances as they develop themselves show to be necessary. In the latter the questions are put with much thought and care, so that nothing can be omitted without extreme negligence, and the power of repeatedly amending makes it easy to obtain a distinct and deliberate answer on oath to every minute subdivision of the matter in question. (*b*)

It is true that in open Court the fear of immediate detection is excited, and often takes away the coolness and nerve of a designing witness; but then the passions are also roused and blind him to the ultimate consequences: (*c*) and the chance of punishment is in reality less formidable when it is to depend upon the memories of persons who hear the witness swearing falsely, (*d*) than when his statement is written down, read over, and corrected, and must remain for ever as a recorded evidence of deliberate perjury.

There is also the advantage which Lord Stowell mentions in

(*a*) Life and Opinions, p. 109.

(*b*) One of the witnesses in the Report of the Chancery Commission calls this, by a quaint but expressive metaphor, "scraping the defendant's conscience."

(*c*) Lord Brougham in his speech on the state of the law, (1828) p. 86, says, with reference to interested witnesses, "Speaking from my own observation, I should say that there is more risk of rash swearing than of actual perjury—of the party becoming zealous and obstinate, and seeing things in false colours, or shutting his eyes to the truth, and recollecting imperfectly, or not at all, when his passions are roused by litigation." He then relates the anecdote quoted *infra*, P. II. ch. 3, § 4, (2).

(*d*) [That one witness may prove this, *vide supra.*]

[12] the following excellent observations, (*a*) "on a public examination a witness may by sudden and ill-understood questions be made to commit contradictions, which are to be held up as fatal to his general testimony. But where a witness is examined deliberately, and in private, upon interrogatories prepared, and has the opportunity of weighing his answers before he finally signs them, they being read over to him, it must at least be admitted, that whatever other disadvantage such a mode of judicial inquiry may be exposed to, it can never be seriously urged that a witness has been entrapped by surprise and through inadvertence, and that he has been made to say in hurry and confusion and from mere weakness of nerves and apprehension, that which, on recollection and deliberation, and the free use of his understanding, he has a right to unsay. Therefore in Courts proceeding in this course of examination, the rule of *falsus in uno falsus in omnibus* is a rule of unexceptionable justice." (*b*)

And many other less important points occur in the details of practice which might be here insisted upon. (*c*)

Disadvantage; context of admission is also evidence.

Nevertheless a great facility for neutralizing some of these advantages has been until lately, and is still partially given by the strict adherence to the rule that a plaintiff shall not read as an admission part of a sentence in an answer, without

(*a*) In the case of the Odin, 1 Rob. 254.

(*b*) [But that the rule will not hold as to persons either ignorant or illiterate who seem to swear falsely in an affidavit, *vide infra.*]

(*c*) In Fenton *v.* Hughes, 7 Ves. 291, a demurrer to a bill for discovery, on the ground that the defendant was a mere witness, was opposed by arguments pointing out the greater efficiency of the examination; but Lord Eldon, though he admitted the truth of the arguments, allowed the demurrer. He says in his judgment, "First, I cannot satisfy myself that a *subpœnâ duces tecum* is as operative for the production of books, papers, and writings, as a *subpœnâ* upon a bill in this Court; secondly, in such a transaction as this, of considerable importance, the fact of usury being to be made out by proof of the nature and quality of the cloth, showing that the sale was colourable, inspection may be material. But then the point is whether upon the distinctions arising out of such circumstances, the rule not to make a mere witness a defendant, especially upon a bill for discovery, has ever been shaken. I can find no such authority." And see Tooth *v.* Dean and Chapter of Canterbury, 3 Sim. 49. [A mere witness being made a defendant, and it being charged that he is interested, when he is not; he should plead, and support his plea by an answer denying that allegation, but cannot demur. Plummer *v.* May, 1 Ves. 426. Amongst the details of practice here only alluded to, may be once more mentioned the avoiding or getting rid of scandal, other impertinence, and even prolixity in the pleadings, and the course of effecting this object, or, in case of prolixity, obtaining redress in costs, *vide infra.*]

letting in the context also as evidence. Lord Erskine stated [13]
the rule rather more largely, thus, "When relief is prayed, and the plaintiff replies to the answer, putting the whole in issue, he cannot, reading the answer as to the contract and consideration, stop at the end of a sentence, but must proceed to the completion of the immediate subject to which the defendant is answering; as at law a witness cannot be stopped where the party, wishing to elicit from him particular facts, finds it convenient to stop him, but must be allowed to finish the particular subject, and to proceed to state any thing with reference to it." (*a*)

The consequence was that [formerly] much of the skill required in drawing an answer consisted in uniting by connecting particles important points of the defendant's case with admissions that could not be withheld. (*b*) This rule however, has lately been much improved by being referred to a sounder principle:—the sense, instead of the grammatical form, has been taken as the criterion. If the plaintiff reads a passage in the answer, the defendant may read another passage qualifying it and "connected in meaning" though not joined to it grammatically. (*c*) Besides which, if a defendant, after a passage has been read, insists upon reading other passages joined to it by words of reference, such as, "Before such demand was made," &c., Lord Eldon ruled that "it is to be read only for the purpose of explaining, so far as explanation may be necessary, the passage previously read in which the reference to it is made. If, in the passage thus referred to, new facts and circumstances are introduced, in grammatical connection with that which must

(*a*) In Lady Ormond *v.* Hutchinson, 13 Ves. 53, [affirmed, see 16 Ves. 94, and see Calcot *v.* Maher, 2 Moll. 316; Skerrett *v.* Lynch, ibid. 320. Upon the same principle, in a case of a bill for discovery only, in aid of an action at law, the Court refused to order the defendant to produce, on the trial or other proceedings incidental thereto, documents, admitted by him in his answer to be in his possession, as it would have deprived him of the benefit of having his answer read at the trial; Browne *v.* Thornton, 1 Myl. & K. 240.]

(*b*) See the examination of the Vice Chancellor [of England], then Mr. Shadwell, Ch. Com. App. 201, Q. 186, &c.

(*c*) Rude *v.* Whitchurch, 3 Sim. 562; he cannot, however, after charging himself in one schedule, discharge himself by another schedule stating his disbursements; Boardman *v.* Jackson, 2 B. & B. 385; but see Ridgeway *v.* Darwin, 1 Ves. 404, and *vide infra*, P. III. ch. 3.

be read for the purpose of explaining the reference, the facts and circumstances so introduced are not to be considered as read." (*a*) And in a later case it was ruled by Sir J. Leach, M. R., that "if the plaintiff read a passage in the defendant's answer as evidence of a particular fact, the defendant has no right to read, as evidence, any subsequent matter although it might be connected with the passage which the plaintiff had read by such words as "but" and "and," unless the subsequent matter was explanatory of the passage read by the plaintiff." (*b*) The practice, however, is still very unsettled; in a much later case, (*c*) the answer contained the following guarded admission, "at the time when the said A. M. was, as untruly alleged in the said bill, wholly incapable of managing her own affairs, she wrote the following letter," &c. Mr. O. Anderdon, [now Q. C.] asked the Vice-Chancellor, (Sir L. Shadwell,) if he might read the admission that she wrote the letter, without letting in also as evidence the words "as untruly alleged in the said bill." The Vice-Chancellor said "No;" but as he intimated at the same time that the words would have very little effect upon his mind, Mr. Anderdon ventured to put in the passage as evidence, and then he read the letter. (*d*)

[14]

Fictions in the bill.

The latitude which is and ought to be allowed for misstatements in the bill, inserted for the purpose of grounding interrogatories upon them, is full of perplexing considerations. (*e*) To state deliberately as facts, matters which are

(*a*) Bartlett *v.* Gillard, 3 Russ. 156.

(*b*) Davis *v.* Spurling, 1 Russ. & M. 64. [Plaintiff having read a passage in the answer, ending "and for the reasons herein mentioned," the Court refused to permit a distinct part of the answer, (containing the reasons referred to) to be read, as evidence, for the defendant; Wolley *v.* Brownhill, 1 M'Cl. 321, and see Popham *v.* Eyre, Lofft, 789; but see Rude *v.* Whitchurch, 3 Sim. 562, cited above, and Nurse *v.* Bunn, 5 Sim. 225. When the answer of a party in another cause is resorted to, as evidence, the whole is admissible both at law and in equity; see Boardman *v.* Jackson, 2 Ball & B. 386.]

(*c*) Scott *v.* Edwards, Jan. 1835, MS.

(*d*) [A plaintiff may read evidence to disprove an allegation contained in a passage which he has read from the answer of a defendant; Price *v.* Lytton, 3 Russ. 206; on this point, see also Kempson *v.* Yorke, 8 Pr. 16, and Hickson *v.* Ayleward, 3 Moll. 33.]

(*e*) [We have already had occasion to advert to the reasons for and the importance of the statements in a bill, especially with a view to the possibility of its being eventually taken *pro confesso*, and used as evidence, and we need hardly add more than a suggestion that Mr. Gresley's opinion as to perplexing considerations arising does not seem to be a sound one. Counsel in settling a bill has almost always forced upon him a work of imagination, apart

doubtful or untrue, would appear palpably unjustifiable, but as this is a necessary preliminary for putting many questions to the defendant which he ought for the furtherance of justice to answer, it has become a practice which the Courts do not check: at least they merely take care that no scandal or impertinence is inserted, and sometimes, when the case has been very unfairly stated, they visit the plaintiff with costs. (*a*) In suits where the common injunction is prayed, the Courts have been considered by a high authority (*b*) to sanction the introduction of fiction, and the Chancery Commissioners, after many careful inquiries on the subject, ventured to suggest no more than that the plaintiff or his solicitor should "annex an affidavit stating that the bill is not filed for delay, and only for [15] the purpose of obtaining equitable relief, or discovery in aid of a proceeding at law." (*c*) It is true that injunction suits seek, besides discovery, another relief peculiar to themselves, but the principle contained in the proposition is a good one and applicable to all cases in which discovery is sought. The evidence of Mr. Heald, who suggested such an affidavit, gives as reasons for not extending it to the belief of the plaintiff in the truth of all the matters contained in the bill, that "a draftsman in forming an injunction bill ought to put that sort of questions to the defendant which counsel at Nisi Prius would put to a witness on cross-examination;" and that "when a case of facts from whence a fraud was intended to be deduced has been brought to an inexperienced counsel to draw a bill, the context of the circumstances often suggests to his mind material circumstances which the instructions did not suggest, but which he thinks probable the circumstances contain; he therefore inserts them, and frequently finds that the circumstances come out so." These of course "the plaintiff could not swear to; indeed he never had an idea of them before the draftsman himself suggested them." (*d*) The Commissioners

from all the misrepresentation which the malice or ignorance of his client may suggest, especially wherever fraud is to be suspected; and the conscience of a good man will suffice to limit the exercise of his skill.]

(*a*) See Binnington *v.* Harwood, 1 Russ. & M. 483.
(*b*) See Ch. Com. App. p. 206.
(*c*) Ch. Com. Prop. 126.
(*d*) Ch. Com. App. p. 353, Q. 53, &c.

appear in their "explanatory paper," to adopt this view of the subject. (*a*)

It would be a simpler process, though not without its difficulties, if the plaintiff were allowed a greater latitude of putting pertinent interrogatories to the defendant, without the necessity of an allegation to found them upon, or on the mere suggestion of a reasonable suspicion. (*b*)

Amendments in the answer striking out or varying admissions, are most sparingly permitted. (*c*) A distinction however is taken between an admission of a fact and an admission of law: the Court considers the former as too solemn and deliberate a proceeding to be struck out, but the latter may be modified or withdrawn. (*d*) There is a peculiarity when the rare case happens of a bill for discovery being allowed to be converted, by amendment and the addition of a prayer, into a bill for relief: the defendant is then allowed to put in an entirely new answer, and the former one is considered as if it had belonged to a former suit: as Lord Eldon said, "it must be read as an answer to a bill of discovery; as evidence: not as a part of the defence or admissions upon which the bill proceeds." (*e*)

[16]

Seeing then that there are so many and great advantages in this mode of obtaining evidence, namely the examination of the defendant [by interrogatories put and answered] in the

(*a*) [The curious reader may find it worth his while to refer to Sand. Ord. Index, tit. Injunction; and, at p. 26 of that work, he will find vestiges of older practice as to this matter.]

(*b*) [But the difficulty of deciding what questions were *pertinent*, and of those which ought to be answered, would be increased, in most cases, just in proportion to the latitude indulged in; and, after all, with a view to be prepared for the case of taking the bill *pro confesso*, the same express allegation would be requisite: indeed here, as elsewhere, it is easier to find fault than to amend. As to the Orders of 26th Aug. 1841, with respect to the interrogating part of bills, see Sand. Ord. 879, cited below.]

(*c*) [Kingscote *v.* Barnsby, Dick. 485.] See the exceptions, Mitf. on Pl. 324, note (*b*). [The practice formerly was to permit an amendment of an answer in case of mistake; but now a supplemental answer is put in. The affidavit, in applying for permission to file such an answer, must state that the defendant, when he put in his answer, did not know the circumstances, upon which he applies, or any other circumstances on which he ought to have stated the fact otherwise; Wells *v.* Wood, 10 Ves. 401; and see Strange *v.* Collins, 2 V. & B. 163.]

(*d*) Pearce *v.* Grove, 3 Atk. 522, Ambl. 65, 1 Eq. Ca. Abr. 29; and see other cases collected there.

(*e*) Butterworth *v.* Bailey, 15 Ves. 363; and see Lousada *v.* Templar, 2 Russ. 561.

pleadings, it is incumbent on the plaintiff, as soon as the answer has been filed, to consider [very] carefully [how far these are answered or not, and] whether he will take exceptions, or amend his bill.

Taking exceptions.

Exceptions may be taken on the ground that the defendant has entirely omitted to answer material parts of the bill [as to which he is expressly interrogated]; or that, in answering certain [of these] points, he has not [done so] with sufficient closeness and perspicuity. (*a*)

On the score of omission.

With regard to the first, the distinction pointed out by Mr. [now V. C. Sir James] Wigram ought to be carefully borne in mind. The word *answer* [involves an] ambiguity, it is one thing when it simply replies to a question, another when it meets a charge; the Answer in Equity includes both senses, and may be divided into an examination and a defence. In that part which consists of an examination, a direct and full answer (*i. e.* reply) must be given (except where certain privileges intervene) to every question asked. (*b*) In that part which consists of a defence, the defendant must state *his* case distinctly, but is not required to give information respecting the proofs that are to maintain it (*c*). For instance, generally

(*a*) [And an answer may be looked at as more or less deserving of credit according as it more or less fairly meets the inquiries in the bill; Freeman *v.* Fairlie, 3 Mer. 42. The general rule, that a defendant who submits to answer must answer fully, is not affected by the decision in Adams *v.* Fisher; see Lancaster *v.* Evors, 1 Phillips, 349.]

(*b*) [At least, see Ord. of 26th Aug. 1841, No. 16, to every interrogatory which, by the note at the foot of the bill, that particular defendant is called upon by the plaintiff to answer. For as to the rest, it is now optional to the defendant, so only that he does not reply to any other statement or charge, by merely stating his ignorance of the matter, for that is forbidden, being treated as impertinence; and see also Nos. 17, 18, and 19, of same Orders; Sand. Ord. 879-80. And by No. 38, of same Orders, a defendant is now "at liberty by answer to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and at liberty so to decline notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer;" Sand. Ord. 885.]

(*c*) The author ventures, instead of saying more on this subject in language of his own, to insert here the two propositions which Mr. [now V. C. Sir James] Wigram establishes, referring to the work itself for the reasoning by which they are supported, and the illustrations by which their application is exemplified.

"I. It is the right—as a general rule—of a plaintiff in equity, to examine the defendant upon oath as to all matters of fact, which—being well pleaded in the bill—are material to the proof of the *plaintiff's case*, and which the defendant does not by his form of pleading admit.

"II. Courts of equity—as a general rule—oblige a defendant to pledge his oath to the truth of his defence. With

[17] speaking, those documents in the defendant's power, which the bill charges to be corroborative of its own statements, must be set forth by the answer, or so mentioned that they may be called for; but those on which the defendant relies for his own support alone, may be merely mentioned by him without being produced.

Touching the rule to be followed by a defendant whom a part only of the bill affects, there are (*a*) many questions, and conflicting cases. They are discussed in Lord Redesdale's Treatise (*b*); where, subject to certain modifications, the general rule is thus stated: "To so much of the bill as it is necessary or material for the defendant to answer, he must speak directly and without evasion, and must not merely answer the several charges literally, but he must confess or traverse the substance of each charge." Of materiality, C. B. Richards explains the test to be "whether, if the defendant should answer in the affirmative, his admission would be of use to the plaintiff: if it would, it must be answered, if not, it is not material." (*c*) The cases are conflicting, but the prac-

[18] tice (*d*) is, for a defendant to pass over those interrogatories in

this (if a) qualification—the right of the plaintiff in equity to the benefit of the defendant's oath, is limited to a discovery of such material facts as relate to the "*plaintiff's case*," and does not extend to a discovery of the manner in which, or of the evidence by means of which, the defendant's case is to be established, or to any discovery of the defendant's evidence."

(*a*) [Or rather were prior to the Orders of Aug. 1841. cited above, p. 20, n (*b*). The question may still have an interest since the interrogatories themselves must be as to such matters as the defendant would under the old system have been bound to answer.]

(*b*) Mitf. on Pl. 309—316.

(*c*) Hirst *v.* Pierce, 4 Pri. 344; and see Bally *v.* Kenrick, 13 Pri. 291; [Jones *v.* Wiggins, 2 Yo. & J. 385.]

(*d*) Mr. Bell in his evidence before the Chancery Commission, speaks of the practice thus, "In respect of the immateriality, it is very difficult to draw a line as to what is material, and what is immaterial: a case very frequently occurs, that a clerk, in the interrogatory part of the bill, has not distinguished between what interrogatories belong to one individual and what belong to another; that he has gone through and interrogated a trustee with exactly the same particularity as he has one of the material defendants in the cause; any gentleman who saw that would not think necessary to go through the whole minutiæ of the case, in the trustee's answer, but would probably put in a short answer that he was trustee under such a deed, and that he has or has not acted under that trust, and is perfectly willing to act as the court shall direct; but if there are exceptions taken to that answer, there may be a great number of cases put, I think, where questions might be found, some of which it might be useful to the plaintiff to have had answered, even in those cases where they would not be evidence against any person except the party himself; as where they might be extremely useful in extracting evidence from other parties. The general rule I conceive

which he has no interest, and his answers to which would be of no other use than mere information; and for the plaintiff, if he wants evidence on those points, to make him a witness. (*a*) The Master is directed by the seventy-fourth of Lord Lyndhurst's Orders [of 3rd April, 1828], "in deciding on the sufficiency or insufficiency of any answer or examination, to take into consideration the relevancy or materiality of the statement or question referred to." (*b*) The Master has not however a discretion given to him to declare the defence so ample as to supersede the necessity of answering fully and to allow to a partial answer the force of a plea; nor is the question permitted to be brought by *quasi* exceptions, or any other form before the Court. (*c*) But in the Exchequer, where exceptions [were] heard before the Court in the first instance, a partial answer, containing a satisfactory defence, but omitting any notice of questions which might be very material if that defence should fail, [was] sometimes allowed. (*d*)

On the score of insufficiency.

With regard to the second ground of exception, it is not

to be that he is bound to answer every question that is asked him, without reference to whether it is, or is not, material; the court would probably take care that that rule was not applied in such a way as to be oppressive to the parties." Ch. Com. App. 3, Q. 21, 22; and see Q. 23, Q. 33, &c. See Agar *v.* Regent's Canal Co. Comp. 212; Jones *v.* Wiggins, 2 Y. & J. 385. [The later Orders of Aug. 1841, already referred to, have considerably diminished this difficulty; but perhaps, in strictness, the proper course would be, by the usual process, first to clear the bill of impertinence and then answer as directed by the orders. An exception for impertinence fails if any part of the passage included in it be not impertinent; Wagstaff *v.* Bryan, 1 Russ. & M. 30.]

(*a*) [As to examining a party as a witness and the course necessary, *vide infra*. As to one made a party who should only be a witness, submitting to answer that he is bound to do so fully, see Cookson *v.* Ellison, 2 Bro. C. C. 252; as to his course, see Plummer *v.* May, *supra*.]

(*b*) See Sand. Ord. 728.

(*c*) See Rowe *v.* Teed, 15 Ves. 377.

(*d*) See Capon *v.* Miles, 13 Pri. 770. And see Hare on Discovery, Part IV. Ch. 3. The practice of the Exchequer with respect to exceptions, was in every way less confined. Thus in Glyn *v.* Soares, (22 Feb. 1836, MS.) the defendant having stated that there were certain documents in the hands of his agents at Paris, relating to the matters in question, but that he was unable to set forth of his information, belief, or otherwise, what those documents were, Mr. Roupel [now Q. C.] stood upon the rule in Chancery that the oath must be taken as conclusive of the defendant's inability to furnish more particular description, the only remedy being an indictment for perjury. But Lord Abinger, C. B. ruled that the answer was insufficient—that the inability did not appear to be insurmountable—and that the defendant ought to have taken some pains to enable himself to answer more fully, by writing and making further inquiries. [And see Clayton *v.* Winchelsea, Earl of, 3 Yo. & Coll. 683, also Farrer *v.* Hutchinson, ibid. 692]

always easy to determine to what extent an admission reaches, when instead of being plenary, it is partial or qualified.

[19]

Plenary admissions.

Admissions are plenary either by the rules of pleading, or by force of the terms in which they are expressed. (*a*) They are of the former kind, on the part of the defendant, when he puts in a demurrer; (*b*) and on the part of the plaintiff when he files no replication, but brings the cause to a hearing on bill and answer. (*c*) A plea or special replication admits fully every point that it does not directly put in issue. (*d*) The same rules apply to an answer when it assumes the form of a demurrer or a plea, by submitting a point of law, or by introducing new facts. Thus a submission that the defendants could not be in any way affected by the notice set forth in the bill, precluded them from disputing the validity of that notice. (*e*) So where a defendant admitted that the plaintiff, a vicar, was entitled to all sorts of small tithes, but insisted on a special exemption, the plaintiff was not obliged (*f*) to show any special title either by endowment or prescription. (*g*)

(*a*) [By Lord Clarendon's Order of 22nd May, 1661, as to answers, "When the defendants have answered, the plaintiffs and their counsel are seriously to advise of the answers; and if they find that upon the answer, alone without further proof, there be sufficient ground for a final order or decree, to proceed upon the answer without lengthening the cause, &c. Sand. Ord. 300.]

(*b*) Mitf. Pl. 107, [or in effect (though involuntarily) when he allows the bill to be taken *pro confesso* against himself.]

(*c*) In that case, [by an Order of 22nd of May, 1661,] "the answer must be admitted to be true in all points, and no other evidence to be admitted unless it be matter of record to which the answer refers, and is proveable by the record;" [Sand. Ord. 300; and note this order of Lord Clarendon's (which is but a repetition of prior orders on this point, ibid. 117 and 225) adds, "The plaintiff is, therefore, to be well advised that the Court be not put to an unnecessary trouble, and himself to a certain charge, in bringing his cause to a hearing which will not bear a decree."] The same effect is produced when the plaintiff, after filing his replication, serves no *subpœnd* to rejoin and produce witnesses; Wy. Prac. Reg. 219. There are conflicting decisions on the question whether an infant admits the answer by omitting to file the replication; Legard *v.* Sheffield, 2 Atk. 377; Thurston *v.* Nutton, 3 P. Wms. 237, note (E); [and see Wrottesley *v.* Bendish, 3 Plow. 237.]

(*d*) Mitf. on Pl. 300, 321. Formerly a plea of the Statute of Frauds was held to admit the agreement against which it was pleaded as a bar; and so of the Statute of Limitations: but now, even when the answer admits it, pleading the statute, the answer is immaterial; see Mitf. on Pl. 265.

(*e*) Bennet *v.* Neale, Wightw. 325. [See Eyre *v.* Dolphin, 2 Ball & B. 303.]

(*f*) Pye *v.* Rea, Bunb. 72.

(*g*) The pleadings at common law are full of such admissions. To instance one; in an action of trespass, when the defendant justified as abating a nuisance, the plaintiff replied excess, and was held to have thereby admitted the nuisance; Pickering *v.* Rudd, 1 Stark. Rep. 56. The cases on judgments by default, payment of money into Court, and particulars of demand under a judge's order, afford useful illustrations of this subject; see them collected in Phill. on Ev. Ch. VII. § 3.

Admissions are plenary, by force of terms, not only when the answer runs in the form, "this defendant admits it to be true," but also when he simply asserts, and generally speaking, when he says that "he has been informed and believes it to be true," without adding a qualification such as "that he does not know it of his own knowledge to be so, and therefore does not admit the same." It must however obviously depend in every case upon the nature of the fact spoken of and the defendant's means of knowledge. (*a*) Admissions, plenary. [20]

But as the answer must meet in some way or other every statement in the bill, [as to which interrogatories are put to the defendant] and the defendant is required to speak "to the best and utmost of his knowledge, remembrance, information, and belief," there will be partial admissions and denials of every shade; some delivered in terms of uncertainty, some mixed up with explanatory or qualifying circumstances. (*b*) The step then required is to dissect them carefully, for partial admissions and denials are, as far as they go, for all purposes equivalent to plenary, and to that extent they will in like manner act as an estoppel. (*c*) Partial.

Mr. Bell, in his examination before the Chancery Commission, declared that "he had always had a very great doubt and never could bring his mind completely to any general rule on the subject, whether the defendant, when challenged for not answering with sufficient particularity, might allege that the question was no more particular than his answer." He gave as an instance to explain the difficulty, "The allegation being that the person has received such a sum of money," the interrogatory has been, "Have you not received such a sum of money?" and, by accident, the words "or any person or persons by your order or for your use," have been omitted; I have known the Master say, under these circumstances, "I will not go beyond your interrogatory." Now it appeared to me to be an error not to allow an exception on those grounds; it is to let off a man by means of a negative pregnant. I conceive in this Particular.

(*a*) See on this subject, Bea. Ord. 28, and the notes there.

(*b*) [See Orders of 26th Aug. 1841, Nos. 16, 17, 18, and particularly No. 19; Sand. Ord. 880.] The effect of such qualification is shown, *supra*, p. 16.

(*c*) *Vide supra*, p. 19.

case it would be very proper to report the answer insufficient for not going further, although the words I mentioned were not inserted in the interrogatory. (*a*) But if you get into a case a little more complicated, it is very difficult to say how far a defendant should go in explanation. Unless it is clear you are
[21] avoiding a disclosure of the truth by a negative pregnant, I think you are not bound to go further in your answer than the interrogatory." (*b*)

Lord Clarendon's Order [of 22nd May, 1661,] attempts to remedy the evil; "An answer to a matter as a defendant's own fact, must regularly be without saying, *To his remembrance*, or *as he believeth*, if it be laid to be done within seven years before, unless the Court, upon exception taken, shall find special cause to dispense with so positive an answer: and if the defendant deny the fact, he must traverse or deny it (as the cause requires) directly, and not by way of negative pregnant; as if he be charged with the receipt of a sum of money, he must deny or traverse that he hath not received that sum, nor any part thereof, or else set forth what part he hath received. And if a fact be laid to be done with divers circumstances, the defendant must not deny or traverse it literally, as it is laid in the bill, but must answer the point of substance positively and certainly." (*c*)

An [obviously] unreasonable demand, as that all accounts, books, letters, &c. concerning the matters in question "may be set forth *in his verbis et figuris*," need not be complied with; to this demand a defendant, answering from Constantinople, set forth a particular, and offered to show them to any appointed person there: the Lord Chancellor, King, is said to have inveighed severely against the counsel who excepted to the sufficiency of the answer. (*d*)

(*a*) [And though it might be argued "*qui facit per alterum facit per se*," and that it would be perjury to deny the receipt if it had been, to his knowledge, received for him.]

(*b*) Ch. Com. App. 3, Q. 16.

(*c*) [Sand. Ord. 229]; Bea. Ord. 179, and see App. 490. [The Court, however, cannot compel a defendant to answer negatively or affirmatively, even as to recent facts; but only to afford such discovery as he swears he is able to give; Nelson *v.* Ponsford, 4 Beav. 41. After all, in the bill as well as for the examination of witnesses, (as is quaintly observed, by the way, in an Order of 1649, No. 19; Sand. Ord. 227.) "Apt interrogatories are the life of the cause." A draughtsman hath need of much logic.]

(*d*) Hornby *v.* Pemberton, Mos. 57; though it is said in 1 Harr. Ch. Pr.

Exceptions, form of.

In the exception the interrogatory must be stated in the very words of it; the plaintiff is not allowed to impose upon the Court the trouble of first determining whether the varied expressions of the interrogatory and the exception are to be wholly reconciled. (*a*)

Amending the bill.

Amending the Bill is useful for various purposes; for the correction of mistakes, or the suppression of impolitic admissions in the original statement; for adding parties; for inquiring into additional facts; (*b*) or the further investigation of facts which have been partially disclosed; (*c*) and for putting in issue new matter stated in the answer. (*d*)

[22]

The whole of this topic belongs so much more to the subject of Pleading, that any lengthened discussion upon it would be misplaced in a Treatise on Evidence. (*e*) The remarks which

p. 322, 7th edit., to be a good ground of exception, that *deeds* prayed to be set forth *in hæc verba*, are not so set forth. [It has been held, that it was no answer to exceptions for insufficiency that the defendant was a witness only and ought not to have been made a defendant, for having submitted to answer he must answer fully; Cookson *v.* Ellison, 2 Bro. C. C. 252. Where a partner is called on for discovery as to matters in the usual course of business, it is no excuse that he is refused access to books, &c. by his co-partner; Taylor *v.* Rundell, 1 Yo. & C. 128. When a plaintiff, by his bill, seeks a discovery of matters which might subject the defendant to a criminal prosecution, and also seeks other legitimate discovery; it is necessary to separate the two; for if they be so mixed up or connected in the bill, that, either by inference or exclusion, answering may lead to a disclosure which might subject the defendant to prosecution, he is not bound to answer any portion of such mixed matter; Lichfield, Earl of *v.* Bond, 6 Beav. 88. Here again we see the office of "apt interrogatories;" but with this case we shall close our citations as to the very important subject of discovery, the same having been so fully and ably treated of by V. C. Sir James Wigram and Mr. Hare, in the several works of theirs we have already had occasion to notice, and, more recently, by the later works on pleading and practice.]

(*a*) Hodgson *v.* Butterfield, 2 S. & S. 236. [As to exceptions in general, see the books of practice and orders.]

(*b*) [Such facts not being however matter for a supplemental bill, as would be all matters happening after filing of the bill.]

(*c*) [For the discovery, elicited by the bill, frequently enables the counsel for the plaintiff very materially to mend the case.]

(*d*) [Without which, in some cases, no evidence could, be entered into, on behalf of the plaintiff, as to such matters, *vide infra*. But where the answer states facts which are material to the plaintiff's case, but which have not been stated in the bill, it is not necessary for the plaintiff, in order to avail himself of them at the hearing, to introduce them by amendment (although perhaps the most convenient course might be so to do) as the replication to the answer (and now the form in lieu thereof) puts all the facts stated in it completely in issue between the parties; and therefore the plaintiff, no less than the defendant, may, after such replication (or form), enter into evidence as to such facts; Atwood *v.* ——, 1 Russ. 355. But that the plaintiff might sometimes conveniently introduce such facts by amendment, see Seeley *v.* Borham, 2 Mad. 176. *Semble*, it is, therefore, most advisable so to do.]

(*e*) [See Dan. Pr. Ch. Bill, Amendment. That a bill cannot be dismissed for want of prosecution until the period for amending it has elapsed; see the Ord. of May, 1845, No. 118. As to such dismissal, ibid. No. 114 to 117.

would be most to the purpose here have been anticipated in speaking of exceptions; the reader may refer to them; merely bearing in mind that [in general] an amendment becomes necessary when an exception for insufficiency has been overruled. An application for an order to amend is an acknowledgment of the sufficiency of the answer, (*a*) unless the amendment be merely to introduce matter which does not call for further answer, such as the addition of a defendant, (*b*) or unless leave to amend be given without prejudice. (*c*) Nor can the answer to the amended bill be excepted to on the same points which were contained in the former answer, (*d*) even when it has stated the circumstances more explicitly. (*e*) Special leave however, to file an exception is sometimes given. (*f*) If the exceptions have been submitted to or allowed, and the plaintiff wish to amend, he may do so by a motion of course, and his motion ought to pray that the defendant may answer the exceptions and amendments together. (*g*) Should the plaintiff except to the answer to the original and amended bill, as insufficient, he must go before the Master upon the old exceptions, as they apply to the original bill, and upon new exceptions as to the new matter introduced by the amendments. (*h*)

Admissions must be put in issue.

[23]

There is no very obvious reason, (except the preservation of regularity in the proceedings), for the rule that an admission in the answer shall be of no avail to the plaintiff unless it is put in

As to amendment of bill, ibid. Nos. 16, 32 to 41, and No. 64 to 70, and as to amendment requiring no answer, ibid. No. 71; and as to affidavit necessary on an application to be allowed to withdraw replication and amend, under Ord. of April, 1828, No. 15, and now Ord. of May, 1845, Nos. 67 and 68, see Phillipps *v.* Goding, 1 Hare, 40, and Ord. of May, 1845, No. 69; Sand. Ord. Index.]

(*a*) Irving *v.* Viana, 1 M'Cl. & Y. 563.

(*b*) Taylor *v.* Wrench, 9 Ves. 315; Miller *v.* Wheatley, 1 Sim. 296.

(*c*) Delatorre *v.* Bernales, 4 Mad. 396; Dixon *v.* Redmund, 2 Sch. & Lef. 515; Jacob *v.* Hall, 12 Ves. 458. [By Ord. of 1618, No. 62, no insufficiency in an answer can be taken hold of after replication put in, because it is thereby admitted to be sufficient; 1 Sand. Ord. 117.]

(*d*) Ovey *v.* Leighton, 2 S. & S. 234.

(*e*) Irving *v.* Viana, 1 M'Cl. & Y. 563.

(*f*) Glassington *v.* Thwaites, 2 Russ. 458.

(*g*) 1 Harr. Ch. Pr. 108.

(*h*) Partridge *v.* Haycraft, 11 Ves. 581; where the subject is discussed at some length; and see Ord. Aug. 1841, No. 19; Ord. May, 1845, No. 16, 22 to 31 inclusive, as to exceptions for insufficiency.]

issue by the bill. (*a*) The consequence of it is that the plaintiff is frequently obliged to amend although a clear case for relief is already standing on the face of the pleadings. (*b*) This would occur, for example, when a bill has stated that the defendant was executor and prays an account of the personal estate of the testator; whatever acts of mismanagement or misconduct the answer may disclose, no decree for an account of what the defendant might "but for his own wilful negligence or default" have received, is obtainable upon a bill so framed, without amendment. Innumerable cases fall under the practice of every day in which amending the bill is necessary or advisable; the passage quoted above from Mr. Bell's evidence contains an instance. (*c*) A case like the following often happens; the bill while it inquires about papers, deeds, &c., omits to allege either that they are in the custody or power of the defendant, (*d*) or that the truth of the matters in the bill would appear from them; amendment then becomes necessary, because if the answer does not supply the omission, a motion for the production of those deeds and papers might be successfully resisted. (*e*)

Allegations to elicit admissions as to documents, &c.

(*a*) [As to the present mode of joining issue, and the form of replication, see Ord. of May, 1845, No. 93; Sand. Ord. 1011, *et vide infra*.

That evidence cannot be read (and therefore ought not to be entered into) even on behalf of an infant, as to matters not stated in the bill, unless put in issue in the answer; see Powys *v.* Mansfield, 6 Sim. 565, and see Holden *v.* Hearn, 1 Beav. 445. See also as to necessity of putting facts in issue with a view to entering into evidence respecting them; Graham *v.* Olliver, 3 Beav. 129; Malcolm *v.* Scott, 3 Hare, 39; and Shepherd *v.* Morris, 4 Beav. 252 The Court of Chancery in Ireland held, that no ground of suit not put in issue by the bill could be considered by the Court; Wallace *v.* Wallace, 1 Con. & Law. 491. But by a general reference in the pleadings to certain depositions, it was held, they were so put in issue as to admit of being read; Houlditch *v.* Donegal, M. of, 1 Moll. 366. On this subject, see also, in the Court of Chancery in Ireland, Fitzgerald *v.* Flaherty, 1 Moll. 350; Mulholland *v.* Hendrick, 1 Beat. 277; S. C. 1 Moll. 359; Farrell *v.* ——, ibid. 359. And a special case where evidence was admitted of a fact, perhaps not strictly put in issue by the pleadings; Sadler *v.* Lovatt, ibid. 162.]

(*b*) Harwood *v.* Tooke, reported in 2 Mad. Ch. Pr. 369; Palk *v.* Clinton, 12 Ves. 62; Wy. Prac. Reg. 372. And see Dormer *v.* Fortescue, 3 Atk. 132; Filkin *v.* Hall, 4 B. P. C. 640. The practice is quite different when a motion for dissolving an injunction is to be opposed; then the plaintiff must show a case against it upon the contents of the answer, and upon what appears in the books and papers referred to by the answer; to allow the injunction to be dissolved and then to amend for the sake of putting facts admitted by the answer into issue, was said by Lord Eldon to be entirely a mistake. Powell *v.* Lassalette, Jac. 551; [*et vide supra*, Atwood *v.* ——, 1 Russ. 355.]

(*c*) *Vide supra*, p. 21, n. (*d*).

(*d*) As in Barnett *v.* Noble, 1 J. & W. 227

(*e*) [It was held, in the Exchequer, that although a bill charged the defendant had papers, &c. in his custody, from which, if produced, the truth of

A bill for the performance of an agreement was amended by adding a prayer that if the originally stated agreement could not be decreed, the plaintiff might have execution of one admitted in the answer; this however was held insufficient, and the bill was dismissed, but without prejudice to the filing of another. (*a*)

Supplemental bill.

After witnesses have been examined, the time for allowing amendments, except the addition of defendants, or such [other amendments] as do not substantially alter the case, has now gone by. The only resource is a Supplemental Bill; respecting which measure information will be found in the Treatise on Pleadings. (*b*)

[24]

Answer of an infant,

Some answers are not of any use in evidence. (*c*) That of an infant can never be read against him; a rule which follows from his presumed incompetency to manage his own affairs, and from its being consequently put in and sworn to by his next friend. (*d*)

or married woman.

Neither can the admission of a married woman answering jointly with her husband; (*e*) but when she answers separately, either with, (*f*) or without, (*g*) the order of the Court, she stands exactly as another defendant. (*h*) In

the matters contained in the bill would appear, yet if it contained no specific allegation to which the charge could apply, it need not be answered; Baldwin *v.* Peach, 1 Yo. & C. 453. In such a case also amendment might become necessary.]

(*a*) Lindsay *v.* Lynch, 2 Sch. & Lef. 1.

(*b*) Mitf. on Pl. 55, [*et vide infra*].

(*c*) [That is to say, in lieu of evidence, as admissions of fact to preclude the necessity for evidence.]

(*d*) This was decided at common law in the case of Eccleston *v.* Speke, alias Petty; Eyres, J., came from the King's Bench to consult the judges of Common Pleas on the point: it seems to have created much interest, for it is reported in 2 Vent. 72, Carth. 79, Comb. 156, and 3 Mod. 258; see [also] Wrottesley *v* Bendish, 3 P. Wms. 237; Hawkins *v.* Luscombe, 3 Swanst. 392; and the cases cited there. [But an answer purporting to be the answer of a minor by his mother and guardian may be read against the mother, in another cause, when she is a defendant in her own capacity; see Bensley *v.* Magrath, 2 Scho. & L. 34.]

(*e*) Hodgson *v.* Merest, 9 Pri. 563; and see 1 Stark. on Ev. 285. See also Elston *v.* Wood, 2 M. & K. 678. [Nevertheless, where husband and wife are both defendants to a bill, the wife also must answer; though the answer cannot be read against the husband, it may probably be read against her, if she survive; Wrottesley *v.* Bendish, 3 Plow. 238; see Shelberry *v.* Briggs, 2 Vern. 249, and Le Neve *v.* Le Neve, 3 Atk. 648.]

(*f*) Travers *v.* Buckley, 1 Ves. 383; and see Mitf. on Pl. 105.

(*g*) Duke of Chandos *v.* Talbot, 2 P. Wms. 371; Le Neve *v.* Le Neve, 3 Atk. 648; Wrottesley *v.* Bendish, 3 P. Wms. 236.

(*h*) [Yet the admission of a will, in the separate answer of a married woman, who is the heiress of the testator, is not sufficient to enable the Court to declare the will established; Brown *v.* Heyward, 1 Hare, 433; such an admission it seems would not bind the inheritance.]

one case a married woman having been sued as an executrix, her husband answered jointly with her and died, and, his death causing no abatement the answer held good against her. (*a*)

Answer of a co-defendant.

It is also a strict rule that the answer of one defendant shall not be read in evidence against another; (*b*) the reason being that there is no issue between the parties and there has been no opportunity for cross-examination. (*c*) An attempt was made before Lord Erskine to read the answer of an executor against the residuary legatee, on the ground that there was no other mode of procuring his evidence; but it was not allowed. (*d*) Where however a defendant stated that his memory was impaired by age, and referred to another person as having been his agent, and as possessing a more perfect knowledge of the matters inquired after than himself, the agent was made a party and his answer was allowed to be read against the principal. (*e*) The circumstance of agency may make this evidence admissible in other cases, as where two defendants are partners. (*f*) There is a case which says that the answer of a defendant not brought to a hearing, was read against another at the hearing. (*g*) It must have been under very peculiar circumstances.

[25]

(*a*) Shelberry *v.* Briggs, 2 Vern. 249; it should be observed that in this case the admission was against the interest of the husband, as well as against that of the wife.

(*b*) Michell *v.* Webb, Toth. 10; Jones *v.* Turberville, 2 Ves. 11; 4 B. C. C. 115; Morse *v.* Royal, 12 Ves. 361. Except those to a bill of interpleader, in which certain passages may become evidence in consequence of the bill not having been demurred to; Bowyer *v.* Pritchard, 11 Pri. 110; and see Angel *v.* Haddon, 16 Ves. 203. The rule extends even to a disclaimer, Hill *v.* Adams, 2 Atk. 39. [Where one defendant, in his answer, assigns a cause for his ignorance, and refers to the answer of a co-defendant for the truth of the matters, the answer of the latter may be read against the former; but this is so readable, as having been thereby made part and parcel of his own answer. Anon. 1 P. Wms. 300.]

(*c*) Chervet *v.* Jones, 6 Mad. 268.

(*d*) Morse *v.* Royal, 12 Ves. 355.

(*e*) Anon. 1 P. Wms. 100. [*Semble*, it was, as though the defendant had made a written statement, which the agent had sworn to, part of his own answer, by reference to it with that intent, like any other writing, and with the proviso that he would only be bound by what the agent then said.]

(*f*) See Wood *v.* Braddick, 1 Taunt. 104; Pritchard *v.* Draper, 1 Russ. & M. 191; Hiliard *v.* Phaley, 8 Mod. 180.

(*g*) Pitt *v.* Willis, Dick. 24. As to admissions made by an answer in another suit, *vide infra*, P. III. Ch. 3, § 1.

Motion to produce documents admitted by defendant in answer to be in his power.

If the answer (*a*) admits a document, (*b*) material to the plaintiff's case, (*c*) to be in possession (*d*) of the defendant, (*e*) the Court considers it (*f*) as a part of the answer, (*g*) and will, on motion, (*h*) order it (*i*) to be left with (*k*) the defendant's clerk in Court for the inspection of the plaintiff, his solicitor, or agent. (*l*) This is nothing more than a practice which has

(*a*) [The admission whereupon this motion is to be grounded must be *in the answer* either in the body, or a schedule which forms part of it; Lopez *v.* Deacon, 6 Beav. 254. A motion for the production of documents referred to *in an affidavit* refused; 2 Dea. & Ch. 192, *et sic de similibus.*]

(*b*) [Whether deed or other writing—the exceptions, and as to what documents, and whether as title deeds or otherwise, have been held to be protected or privileged; *vide infra.*]

(*c*) [Or rather to the proof of the plaintiff's case, for which such document might possibly be a matter or means of evidence; Combe *v.* Corp. of L., 1 Yo. & C. 631. Documents forming part of the evidence of the defendant, for all that, to be produced, if forming part of evidence of plaintiff; Bute, M. of *v.* Glamorgan Canal Co., Nov. 1845. Before Lord Lyndhurst, C. on appeal.]

(*d*) [Or even in the power of the defendant; Taylor *v.* Rundell, 1 Cr. & P. 104: or about to be so on arrival expected from abroad; Farquharson *v.* Balfour, Turn. & Russ. 190: or which may be reasonably inferred to be in the power of the defendant, allowing him to show the contrary, if he can, by affidavit; Morrice *v.* Swabey, 2 Beav. 500.]

(*e*) [Or of his agent or solicitor; 2 Dan. Pr. Ch. 259; if as such solicitor, for then indeed it is deemed to be, at least, in the power of the defendant. But when certain documents were sworn to be in the possession of another person, a motion to produce them was refused with costs; Murray *v.* Walter, 1 Cr. & P. 114; but see Walburn *v.* Ingilby, 1 Myl. & K. 61. Discovery of documents in the possession though not the power of defendant enforced unless he can swear them to be irrelevant, &c. Bate *v.* Bate, Rolls, 4th March, 1846.]

(*f*) [So far as its mere existence; but of course the date, contents, purport, and effect, so far as not set forth, are all to be gathered from the inspection of itself, which such admission challenges, or at least affords ground to claim.]

(*g*) [Or of that answer the plaintiff might insist upon having.]

(*h*) [Upon which occasion the defendant may, at his own expense, by affidavit, show any ground of inability omitted to be mentioned in, yet consistent with his answer. The plaintiff, however, must rely solely on the admissions. He cannot use affidavits instead of such admissions or in aid of them; Barnett *v.* Noble, 1 J. & W. 227.]

(*i*) [Within a reasonable time; Farquharson *v.* Balfour, Turn. & Russ. 198. And subject to the right of the defendant, by an affidavit, to show ground for exemption, to which we shall presently refer.]

(*k*) [The proper officer of the Court; at present the clerk of the records and writs (by an Ord. of 26th Oct. 1842; Sand. Ord. 916) now performs this duty. It is only by consent that this part of the order is varied; Maund *v.* Allies, 4 Myl. & Cr. 503. The Court of Exchequer in one case ordered the production and inspection to be at the office of the solicitor of the party when the documents were numerous; Crease *v.* Penprase, 2 Yo. & C. (Ex. Eq.) 527. Where the possession is admitted, the practice in the Court of Chancery, when it is stated the books, &c. are in daily use, is to order the inspection at the place of business; and if a satisfactory inspection be not then obtained, for the party to be at liberty to apply for a further order; Grave *v.* Cooper, 4 Myl. & C. 263. After such an order allowing the plaintiff, or his solicitor, to inspect and take copies of documents, at the office of the defendant's solicitors, the solicitors not agreeing by whom the copies were to be made, the documents were ordered to be deposited with the clerk of records and writs; Prentice *v.* Phillips, 2 Hare, 152.]

(*l*) Bettison *v.* Farringdon, 3 P.

been allowed for convenience; formerly such documents were always set forth *in hæc verba.* (*a*) The order is made upon two principles, security pending litigation, and discovery for the purposes of the suit; (*b*) not for other purposes, as to assist the plaintiff in carrying on his trade. (*c*) It was made, even although an injunction obtained by the plaintiff had been dissolved on the ground that the contract which he sought to enforce was illegal. (*d*) The deeds of a client will be ordered to be produced on the admission of his solicitor, if the client would have been bound to produce them himself. (*e*) When the order had been made and was appealed from, a motion to stay execution was refused with costs; and in the same case a solicitor was compelled to admit an inspection although other persons, not before the Court, objected on the ground of its being one of their title deeds. (*f*) The Court will order documents, or copies of them, to be brought from a foreign country within a reasonable time, and if they are not brought, will consider it the same as if the defendant had had them in his possession in the first instance, and had refused to

Those which support the plaintiff's case;

[26]

Wms. 364; Gardiner *v.* Mason, 4 Br. C. C. 479; Taylor *v.* Milner, 11 Ves. 41; Potts *v.* Adair, 3 Swanst. 268, note; Anon. 6 Mad. 97. So although the party be a corporation; City of London *v.* Thomson, *et e cont.* 3 Swanst. 265, note. The nature of the "interest" which the plaintiff must have in such a document is discussed at length by Mr. [now V. C. Sir James] Wigram, in his Points on the Law of Discovery, p. 200, &c. [And in Story *v.* Lord Geo. Lennox, 1 Keen, 341, (and the cases cited below) as to applications and exceptions to the rule. Further on this particular subject, see Mr. Headlam's edition of Dan. Ch. Pr.]

(*a*) See Wigr. on Disc. p. 13, &c. [As to somewhat similar proceedings, as to producing documents, at law, by way of illustration and distinction on this subject, the reader may refer to Thomas *v.* Dunn, 6 Sc. N. R. 834; S. C. 1 Dowl. & L. 535; Goldiff *v.* Fuller, 14 Mee. & W. 4; S. C. 2 Dowl. & L. 661, and 14 Law J., N. S. 104. Also Southampton, Mayor of *v.* Graves, 8 T. R. 590, and Hall *v.* Bainbridge, 14 Law J., N. S. 289.]

(*b*) [But it is to the latter principle only which we shall here particularly advert; viz. the discovery in aid of the proof of the case of the plaintiff, either by evidence or obviating the necessity of such.]

(*c*) Lingen *v.* Simpson, 6 Mad. 290.

(*d*) Evans *v.* Richard, 1 Swanst. 7; [and Pilkington *v.* Hunsworth, 1 Yo. & C. 617. And the order will be obtainable although exceptions to the answer be pending; Hunter *v.* Capron, 5 Beav. 93. And although between notice of motion and motion plaintiff has obtained leave to amend; Chedwick *v.* Pribble, 6 Beav. 264. Inspection of documents, in an injunction case, was obtained to oppose the motion to dissolve; Powell *v.* Lassalette, 1 Jac. 549.]

(*e*) Fenwick *v.* Reed, 1 Mer. 114.

(*f*) Walburn *v.* Ingilby, 1 M. & K. 70. But a mortgagee will not be compelled to produce the deeds of his mortgagor; Lambert *v.* Rogers, 2 Mer. 489. [Yet, under special circumstances, at suit of assignee of lessor, assignee of lessee claiming as mortgagee only was ordered to produce the lease and assignment; Balls *v.* Margrave, 4 Beav. 119.]

produce them. (*a*) A defendant, a solicitor, cannot resist on the ground of lien the production of a deed which is sought to be impeached. (*b*)

If a party files a bill for a discovery of deeds, &c., and for relief, and afterwards brings an action at law, and then moves for the production of the deeds, his motion will be refused; for the Court of Equity having, been first applied to, expects to have the direction and control of the proceedings at law: his proper course is to proceed with his suit in Equity, and by its decretal order the Court will give all such directions as will ensure him a fair trial. (*c*) The rule as to producing papers upon a trial at law [directed by the Court of Equity] is stated by Lord Eldon nearly in these words; the Court directs a trial in such a way that all productions which it conceives to be useful upon that trial shall be made; but if upon a bill praying an injunction against an action, and relief, the injunction is refused and the trial at law proceeds, the plaintiff may only read what he might have read without the direction of the Court, the answer, and, as part of the answer, all books, &c., referred to by it. (*d*)

Those which support the defendant's case.

[27]

If the answer speaks of a document which is not material to the case of the plaintiff, but merely supports that of the defendant, it will not be ordered to be produced. (*e*) But when the defendant, stating it to be in his own possession, *refers to it*, he is taken to have incorporated it in the answer, and to have waived all right of withholding it, as effectually as

(*a*) Farquharson *v.* Balfour, 1 T. & R. 190; Gabbett *v.* Cavendish, in the Chancery in Ireland, 3 Swanst. 267, note.

(*b*) Balch *v.* Symes, 1 T. & R. 87; see some observations on this and several similar cases, in Wigr. on Disc. 145.

(*c*) See Aston *v.* Lord Exeter, 6 Ves. 288; Hylton *v.* Morgan, 6 Ves. 294.

(*d*) Marsh *v.* Sibbald, 2 V. & B. 376. [A defendant, to a bill, merely for discovery in aid of an action at law, will not be ordered to produce, upon the trial or any other proceeding, documents admitted by his answer to be in his possession; Brown *v.* Thornton, 1 Myl. & Cr. 243. Where the defendant, in a suit for discovery, has been ordered to deposit in the hands of the officer documents admitted, by the answer, to be in his possession, &c., the plaintiff is entitled to have his attendance at the trial with such as are referred to in the body, to be read as part, of the answer; Driver *v.* Wright, 9 Sim. 261.]

(*e*) Buden *v.* Dore, 2 Ves. 445; Burton *v.* Neville, 2 Cox, 242; Lady Shaftesbury *v.* Arrowsmith, 4 Ves. 66; Simpson *v.* Swettenham, 5 Mad. 16. [That is not merely on such an admission of it's mere existence, even coupled with the admission of it's being in the possession or power of the defendant.]

if he had set it forth at full length. (*a*) This point was decided in *Hardman* v. *Ellames*, (*b*) a case which has been so warmly controverted, and in which our present subject was so fully discussed, that the judgments of Lords Commissioners Shadwell and Bosanquet, may be usefully inserted here. "The object of the present application is to discharge an order made by the Master of the Rolls upon the defendant for the production of certain indentures admitted by the defendant to be in his possession. The defendant has by his answer in part set forth the deeds in question, which are comprised in a schedule annexed to the answer, as being documents in his possession, and he has for greater certainty craved leave to refer to the indentures themselves when produced. If by so doing the defendant has made the indentures a part of his answer, it seems to follow as a necessary consequence that the plaintiff, having a right to read the whole of the defendant's answer, has a right to read the documents so made a part of his answer.

"The question which arises in this case has been involved in some confusion on account of its having been mixed up with questions of a different kind. There are three cases which may arise; the documents may not be referred to, but they may be admitted to be in the defendant's possession; they may be referred to and not be in the defendant's possession; or they may be in part set forth or shortly stated in the answer, and referred to, as in the present case, for the defendant's greater certainty when produced.

"Where the documents are not referred to, but are admitted to be in the defendant's possession, there the question whether the defendant shall produce them or not is determined by considering whether the documents do or do not relate to the title of the plaintiff. (*c*) If they relate solely to the title of the [28]

(*a*) [That is, supposing it to be a document to which the defendant craves leave to refer, to qualify the admissions in his answer, without production and inspection by the plaintiff, such reference in the answer would be unintelligible; *vide infra*, p. 35, *et seq.*]

(*b*) 2 M. & K. 732. [A reference, by way of extract of part of a lease, in a bill of exceptions, limited in its effect to that part only; see Galway *v.* Baker, 4 Cl. & Fin. 157.]

(*c*) [Or rather (as the later cases seem to shew) to the case made by the plaintiff in his bill not being met either by plea, demurrer, or absolute denial, on the part of the defendant; *vide infra*.]

defendant, in that case the order for the production is not made; this appears from the case of *Bligh* v. *Berson:* (*a*) on the other hand, if they are material to the plaintiff's case, the Court will order their production, as in the case of *Firkins* v. *Lowe.* (*b*) In both of those cases the documents were admitted to be in the defendant's possession, and in neither of them were the documents so referred to as to be made part of the defendant's answer. In *Burton* v. *Neville,* (*c*) where the plaintiff claimed under a settlement and the defendant under recoveries, and the defendant admitted the deeds to be in his possession, but did not submit to produce them, a motion for their production was refused, the Lord Chancellor observing that plaintiffs could only call for those papers in which they had shown that they had a common interest with the defendant.

"Secondly, in the case where the documents are referred to and not admitted to be in the defendant's possession, it is perfectly clear that the Court cannot order production, unless it turns out that the documents, stated not to be in the possession of the defendant, happen to be in the hands of some person over whom the defendant evidently has controul. Thus, in in the case of *Darwin* v. *Clarke,* (*d*) where the answer admitted the execution of an instrument, but did not admit it to be in the defendant's possession, custody, or power, the motion for production was refused.

"A third class of cases is where the contents of instruments are in part stated in the answer, and referred to for greater certainty. In *Atkyns* v. *Wright,* (*e*) a motion was made for

(*a*) 7 Pri. 205. [When the defendant (in his answer) denies the plaintiff's title, and states positively that the deed in his possession will not show title in the plaintiff, the Court will not compel the production; *aliter* if he states only his belief that they will not; Bannatyne v. Leader, 10 Sim. 230. Where the defendant (in his answer) described a document (a survey) as constituting his own evidence, and in support of his own case, and not that of the plaintiff, and to have been made with a view to his own defence; held, that such document was but as a minute of evidence, which a witness could give, and the defendant was not bound to produce it; Llewellyn v. Badeley, 1 Hare, 527.]

(*b*) 13 Pri. 193. [Although they may be deeds relating also to the title of the defendant; Farrer v. Hutchinson, 3 Yo. & Col. 692, and some more recent cases not yet reported. A case of tithes, and as to the production of various books, &c., see Firkins v. Lowe, 13 Pri. 193, and S. C. 1 M'Clel. 73. Of the use made of such books, &c. as evidence, *vide infra.*]

(*c*) 2 Cox, 242.

(*d*) 8 Ves. 158.

(*e*) 14 Ves. 211.

the production of a document which appeared to be in the possession of the defendant Graham, and Lord Eldon was of opinion, under the particular circumstances of that case, that the plaintiff could not compel the production of the deed; but he observes that where a defendant had in a great measure set forth the contents of an instrument, and for the truth of what he set forth referred to the instrument, there was no [29] question of production, as he made the instrument part of his answer. This appears from the case of *Herbert* v. *The Dean and Chapter of Westminster*, (*a*) where Lord Macclesfield says, that "as to the motion that the plaintiffs should produce the vestry books before a Master, since they in their answer to a cross bill refer thereto, and by that means make them part of their answer, referring to them (as it is said) for fear of a mistake; for that reason the Court ought to let the defendants see them." So in *Bettison* v. *Farringdon*, (*b*) Lord Talbot says, "the defendants by referring to the deeds in their answer, have made them part thereof." There is a query in the note to that case, whether the bare referring to a deed without setting it forth *in hæc verba*, will make it part of the answer, and *Hodson* v. *The Earl of Warrington* in the same book is referred to; but I may take this opportunity of observing that the cases in the third volume of Peere Williams are not of equal authority with those in the two preceding volumes which were published in his lifetime. In *Marsh* v. *Sibbald*, (*c*) Lord Eldon says, that every book, letter, memorandum, &c., referred to by the answer, is a part of the answer; and in *Evans* v. *Richard*, (*d*) the same learned Judge says, that when the Court orders letters and papers to be produced, it proceeds upon the principle that those documents are by reference incorporated in the answer and become a part of it.

"It appears therefore, upon a review of the cases, to be perfectly settled that where a defendant in his answer states a document shortly or partially, and for the sake of greater caution refers to the document in order to show that the effect

(*a*) 1 P. Wms. 773.
(*b*) 3 P. Wms. 363.
(*c*) 2 Ves. & Bea. 375.
(*d*) 1 Swanst. 7.

of the document has been accurately stated (*a*) in such a case the Court will order the document to be produced. It was said, in the present case, that the document ought not to be produced, because it only manifests the defendant's title; but the answer to that is, in the first place, that it may by possibility do something more than merely manifest the defendant's title. It would be a strange thing to say that the defendant should at the hearing have the advantage of other
[30] parts of the deed than those set forth in the answer, and that the plaintiff, who looks to the answer for information, should not be at liberty to avail himself of a knowledge of the deed. It seems to be consistent with justice, that if the defendant makes a document a part of his answer, the plaintiff is entitled to know what that document is, because he has a right, at the hearing, to read such parts of the defendant's answer as he thinks fit. (*b*) It is to be observed, also, that if the plaintiff should think proper to amend his bill, and require the deed to be set forth at length, it would be a matter of course that the deed should be so set forth." (*c*)

It will be observed that this decision is supported by three distinct arguments,—that the defendant would have the exclusive advantage of parts of the deed set forth,—that the deed may by possibility assist the plaintiff's title,—and that by amending the bill the plaintiff might insist upon having the whole document set forth. Mr. Wigram contests every one of these grounds, (*d*) and,—(if the author may presume to support

(*a*) [By which he secures himself the right of the original document, so referred to, being read at the hearing; see Cox *v.* Alingham, Jac. 337; Owen *v.* Jones, 2 Anst. 505; as to reference by way of extract, *vide supra*, p. 33, n. (*b*). The effect of such incorporation, as entitling plaintiff to the use of a copy of the document, in certain cases; see Rawson *v.* Samuel, 4 Myl. & Cr. 330.]

(*b*) [The reader hardly needs to be reminded that, after production and inspection of such documents, &c. it may still remain for plaintiff to prove them in the usual manner, so far as he cannot do so by using admissions which he might read from the answer; admissions extorted by his bill and the amendments suggested by the answers.]

(*c*) [*Sed contra, vide supra*, p. 25, n. (*d*). Later cases seem to carry this still further, or, at least, to make it more apparent. Where the reference to a document was merely—"as when produced will appear," and not even followed by any craving leave to refer, &c., yet the production was enforced, upon the principle referred to in the text; Walford *v.* Stainthorpe, 2 Beav. 537.]

(*d*) [And as to this, see the 2nd edit. of Wigr. on Disc. p. 201, note (*t*). In which work, the earlier cases are fully referred to, and the whole matter thoroughly discussed. Later cases will

him against the weight of so high authority),—with great success. Yet after the warning which this decision holds out, it must be expected rather that equity-draftsmen will protect themselves by their own carefulness from the inconvenience of the rule thus established, than that any future Judge will take upon himself to overrule it. (*a*) This they may obviously do by cautiously avoiding [if possible] to refer to a deed which supports the defendant's case, or, perhaps better, by qualifying the reference with words like these, "but not intending thereby to make it a part of his answer." Admissions qualified;

This motion however is often successfully resisted; either on the form in which the admission has been made, or on the nature of the documents themselves. Resistance to the motion;

Besides [first] admitting a document (*b*) to be in his possession, and [secondly] (where it supports his own case), referring to it, the defendant must also [in the last place] give some description of it, or else, clearly, the Court is unable to make any order calling for it. The first of those requisites was wanting in *Darwin* v. *Clake*, (*c*) where the defendant merely admitted that a certain instrument had been duly executed, craving leave, in the usual way, to refer to the same [when produced]; the order was refused. (*d*) When the second was wanting, Lord Eldon said, "If this book is not referred to by the answer of the defendant, I cannot order it to be produced; and you must get at it by amending your bill." (*e*) With regard to the third, in *Atkyns* v. *Wright*, the defendant denied the case made out by the bill, but mentioned, as an additional defence, On the form of the admission; [31]

be cited hereafter, and particularly the cases lately decided by Lord Lyndhurst, C., on appeal (in Nov. and Dec. 1845,) viz. Bute, M. of *v.* Glamorgan Canal Comp., 9 Jur. 1063, and Combe *v.* London Corp. of, cited below.]

(*a*) [Of how little avail even "great skill and dexterity" may be, when the case comes within the rules of the Court; see Edwards *v.* Jones, 9 Jur. 145.]

(*b*) [Such an one as he cannot but admit the plaintiff has a right to the production of; being such as, if produced, will, or at least may, support the case made by the plaintiff, not necessarily as evidence of the plaintiff's title, in the ordinary sense of the word, but as evidence of the allegations in the bill to entitle the plaintiff to the relief sought; see *dictum* of Lord Lyndhurst, C., in Bute M. of *v.* Glamorgan Canal Co., 9 Jur. 1064, *et vide infra.*]

(*c*) 8 Ves. 159; and see Wales, Pss. of *v.* Lord Liverpool, 1 Swanst. 121; and the cases cited there.

(*d*) [Of course, an amendment of the bill, charging the deed to be in defendant's possession, &c. and interrogating pointedly as to the fact, would be the proper course in such a case.]

(*e*) Marsh *v.* Sibbald, 2 Ves. & Bea. 372.

an indenture purporting to be a release to himself and others, of which he gave the date and craved leave to refer to it when produced; Lord Eldon held that this indenture was not sufficiently described for the order to be made, and that the defendant must be understood to mean that in this stage, he did not put his defence on a plea with *profert*; (*a*) but merely stated the existence of such an instrument; which was to be his defence if he should produce it, not otherwise. (*b*) But this necessity for accurately describing documents was said by Sir J. Leach, V. C., to apply only to cases of discovery, and that then they ought to be set out in a schedule. (*c*) Nothing short of an admission in the answer will suffice; affidavits are not listened to. (*d*) And there is sometimes added a qualified submission, to produce the document if the Court should require it;—when that has been done, the Court will exercise its discretion. (*e*)

In the clause which charges that divers deeds, &c., are in the defendant's possession or power, the common form "whereby if produced the truth of the matters aforesaid or of some of them would appear," is often sufficient to obtain the documents required, for the Court cannot on an interlocutory motion inquire strictly into their materiality. (*f*) If this clause does not reach them, it is usual to introduce [into the bill,] by

(*a*) [As to the necessity of a profert of a deed pleaded at law, see Hodgson *v.* Warden, 2 Dowl. & L. 232; S. C. 13 Mees. & W. 22.]

(*b*) Atkyns *v.* Wright, 14 Ves. 211. [So an admission of having possession of "divers books of account," was held not sufficiently specific to enable the Court to make an order for their production; Inman *v.* Whitley, 4 Beav. 548.]

(*c*) Anon. 6 Mad. 97; see more on these points, Wigr. on Disc. [When the documents are numerous, how to refer to and describe them most conveniently and without being too prolix; see Christian *v.* Taylor, 11 Sim. 401.]

(*d*) Barnett *v.* Noble, 1 J. & W. 227. [As to affidavits on a motion for production of documents, when allowed, see below, and see Addis *v.* Campbell, 1 Beav. 258; when not, see Edwards *v.* Jones, 9 Jur. 145, where Lord Lyndhurst, C., laid it down that "where a party neither admits nor denies a fact, and a motion of this kind is made, an affidavit cannot be received for the purpose of proving it." Ibid. 140.

Affidavits may be used to modify the order for production and inspection by defining such parts of the documents as relate to other matters, &c. Curd *v.* Curd, 1 Hare, 274; as to costs of such being paid by the defendant, *vide infra*.]

(*e*) Anon. mentioned by Lord Eldon, 14 Ves. 213.

(*f*) [If the defendant in his answer, does not deny this allegation, with respect to a document which he has admitted to be in his possession, it is a fair inference that he cannot deny it, but nevertheless it will not avail; see Edwards *v.* Jones, *ut supra*.]

amendment, a specific allegation that they are in the possession of the defendant, (*a*) and so to extort an admission that may authorize the order. (*b*)

[32]

On the nature of the document.

The nature of the document itself, and the circumstances under which it was written, are often a sufficient protection. (*c*)

Title deeds of the defendant.

Title deeds need not be shown (*d*) if there is "nothing to be inferred from any passage in the answer that they evidence the title of the plaintiff." (*e*) In the case from which these words are quoted the production of deeds was also resisted on another ground, which has frequently been brought before the Court; it was an attempt to compel the production of cases which had been laid before counsel, and the opinions returned on them. (*f*)

Cases laid before counsel and opinions thereon.

The question depends upon the general principle of the protection given to all communications with professional advisers. (*g*) The House of Lords in one instance

(*a*) [And to add that "thereby, if produced, the truth of the allegations in the bill (introduced by amendment, if need be, for that purpose, viz. the allegations of ground for the relief sought) would appear, and then interrogate, &c."]

(*b*) Lord Eldon in Wales, Pss. of *v.* Liverpool, Lord, 1 Swanst. 123; Erskine *v.* Bize, 2 Cox, 229.

(*c*) [See Knight *v.* Waterford, M. of, 2 Yo. & C. (Ex. Eq.) 122.]

(*d*) [See Atty. Gen. *v.* Strutt, 3 Beav. 396.]

(*e*) Bolton *v.* Liverpool Corp. of, 3 Sim. 490, and 1 M. & K. 90; Glegg *v.* Legh, 4 Mad. 193; Tomlinson *v.* Lymer, 2 Sim. 489; Tomlinson *v.* Booth, 4 Sim. 461. An heir at law, even if he admits a will to be duly executed, has no right to inspect title deeds; but he might have such right if he insisted upon some old entail, or controverted the legality or execution of the will, or alleged that a part only of the real estate had been devised away; Lord Hardwicke, in Potter *v.* Potter, 3 Atk. 719. [But yet the inferences alluded to in the text may be slight, and merely such as to induce a suspicion; as in Farrer *v.* Hutchinson, 3 Yo. & C. (Ex. Eq.) 692; and see Smith *v.* Beaufort D. of, 1 Hare, 507, where the answer did not deny it: but in Atty. Gen. *v.* Strutt, cited above, the answer did deny it.

The general rule that the Court will not compel a mortgagee to produce his deeds, &c. even for inspection only, until after payment; see Bentinck *v.* Willink, 2 Hare, 1; where the rule was applied to a case of real property situate in Demerara. But where they are impeached for fraud, documents (bills of sale, &c.) though relating to the title of the defendant, will be ordered to be produced; Neat *v.* Latimer, 2 Yo. & C. 257. So title deeds are ordered to be produced when impeached for fraud, though the fraud is denied by the defendant in his answer; Bussford *v.* Blakesley, 6 Beav. 131. A title deed of the defendant's was ordered to be produced, where it contained a recital that might affect him with constructive notice of the interest of the plaintiff in the estate; Nelson *v.* Clarkson, 2 Hare, 166.]

(*f*) [As in Combe *v.* London Corp. of, 4 Yo. & C. (Ex. Eq.) 139; S. C. 1 Yo. & C. 631; where the principle alluded to was acted upon most fully.]

(*g*) [This seems rather too broadly laid down; *sed vide infra*, P. II. Ch. 3, § 4, (3). As to the *quasi* disability of certain professional advisers to testify, as to the communications made to or by them as such, for the more recent cases, where the doctrine of such protection to privileged communications has been discussed, see Carpmael *v.* Powis, Lyndhurst, C., affirming the decision of the M. R., 25th March, 1846, when reported; also Langley *v.* Fisher, 5 Beav. 443, and cases cited, viz. Desborough *v.* Rawlins, 3 Myl. & Cr. 518; Bunbury *v.* Bunbury, 2 Beav. 173; Herring *v.* Clobury, 1 Phill. 91; Jones

compelled the defendant to produce the case which he had sent, but not the opinion which he had received. (*a*) This however was not satisfactory. It was indeed followed in the Exchequer without much observation, in one instance, where the further difficulty having occurred that the second case sent to a counsel quoted the opinion which he had returned to the first, the additional facts therein stated were ordered to be produced. (*b*) Lord Lyndhurst also, when Chief Baron, considered himself bound by the rule so laid down; (*c*) but in a judgment given since that time, Lord Brougham [then Lord Chancellor] ably exposes its fallacy, with these and other comments, "It seems plain that the course of Justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his
[33] rights. The very case which he lays before his counsel, to advise upon the evidence, may, and often does, contain the whole of his evidence, and may be, and frequently is, the brief with which that, or some other counsel conducts his cause. (*d*) The principle contended for, that inspection of cases, though not of opinions, may always be obtained as of right, would produce this effect, and neither more nor less, that a party would go into Court to try the cause, and there would be the original of his brief in his own counsel's bag, and a copy of it in the bag of his adversary's counsel. (*e*) Another

v. Pugh, ibid. 96; Walker *v.* Wildman, see also Clagett *v.* Phillips, 2 Yo. & C. 82, and Stark. Ev. 9th edit. Appendix, 1381; *et vide infra*]

But the right of the party to withhold evidence is not exactly co-extensive with the incompetency of the adviser to give it; see the observations of Alexander, C. B. in Preston *v.* Carr, 1 J. & W. 177; and see Greenhough *v.* Gaskell, 1 M. & K. 93. [The adviser cannot insist upon it or lose it; his client may both claim it and forfeit it. Nor is every professional communication privileged, *e. g.* Letters of the solicitor of a defendant written to a witness, under the circumstances mentioned in the report, were held to be not sufficiently protected from production, by the privilege alluded to; Dartmouth Mayor of, *v.* Holdsworth, 10 Sim. 476; *et vide infra*, p. 41, n. (*a*), and Greenhough *v.* Gaskell, referred to in the text]

(*a*) Radcliffe *v.* Fursman, 2 P. B. C. 514.

(*b*) Preston *v.* Carr, 1 Y. & J. 175.

(*c*) Newton *v.* Berresford, 1 You. 376.

(*d*) [As to briefs, (by the way,) see Knight *v.* Waterford M. of, 2 Yo. & C. 22; in which case see also much which is strictly applicable to the subject more particularly discussed in the text.]

(*e*) Bolton *v.* Liverpool Corp. of, 1 M. & K. 94. [And yet, in May, 1845, Lord Brougham himself, being out of office, offered to bring a bill into Parliament, "for enabling Parties to be examined in the Trial of Civil Actions"! It was ordered to be printed, and commenced thus: "For the better enabling the truth to be ascertained, &c."! A suit in Equity was, however, one of the exceptions provided for: and it may be observed that the statute 6 & 7 Vict. c. 85, had been passed in the meantime.]

distinction was taken by the Vice Chancellor, (Sir L. Shadwell,) in the same important cause, and some years before in a Nisi Prius case by Lord Tenterden, namely that the protection extends only to communications made respecting the cause before the Court; (*a*) but the position seems scarcely tenable. Much of Lord Brougham's reasoning is equally applicable to advice unconnected with a suit, and it would be dangerous, as Dallas, C. J. and the other Judges observed in a case in the Common Pleas, to let it be supposed possible that a solicitor to whom a person had written respecting a flaw in his title should be compellable to produce the latter and give evidence concerning it. (*b*) Lord Brougham, [however, seems to have] evaded the authority of *Radcliffe* v. *Fursman*, (the decision in the House of Lords,) by resorting to this doctrine, and pointing out that it is not there shown whether the case and opinion bore reference to the pending suit. In *Greenhough* v. *Gaskell* he was again pressed by the force of the same authority, but he again escaped from it, and narrowed the distinction, by confining it strictly to the client, and not allowing it to be applied to a solicitor. In that case he said, "To force from [34] the party himself the production of communications made by him to professional men, seems inconsistent with the possibility of an ignorant man safely to resort to professional advice, and can only be justified if the authority of decided cases warrants it. But no authority sanctions the much wilder violation of professional confidence, and in circumstances wholly different, which would be involved in compelling counsel or attorneys or solicitors to disclose matters committed to them in their professional capacity, and which, but for their employment as professional men, they would not have become possessed

(*a*) 3 Sim. 487; Wadsworth v. Hamshaw, 2 Bro. & Bing. 5, note. It seems to be sanctioned in Hughes v. Biddulph, 4 Russ. 190, where the order excepts "such of the said letters, &c. as the "defendant shall declare upon her oath "to have passed between her and R. "A. D. and J. C. W., &c. merely in "the relation of solicitor and client, "and to have passed in the progress of "this cause, or with reference to this "cause, previously to its being instituted;" also in Vent v. Pacey, 4 Russ. 192, and in Garland v. Scott, 3 Sim. 396.

(*b*) See the observations of Dallas, C. J. and Richardson, J., in Cromack v. Heathcote, 2 Bro. & Bing. 6; and those of Lord Alvanley, M. R., in Cranstoun Lord, v. Johnston, 3 Ves. 179. [And yet, as we have had occasion to notice, when deeds are impeached for fraud, even although the defendant should, by his answer, deny the fraud he is ordered to produce them; *vide supra*, p. 39, n. (*c*).]

of. As regards them it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation." (*a*)

It should be observed that cases laid before counsel stand upon a totally different footing from admissions, to which it may be rationally contended that the opponent ought to have every facility of access; for [whilst admissions, by way of discovery, can only be extorted by the plaintiff having a right to such, and are made by the defendant advisedly, carefully, and truly, being on oath,] neither law nor morality can demand that a case [whereupon to obtain the opinion or advice of counsel, or of any other practitioner or professional person consulted,] should state the truth [or be taken as an admission on the part of the client; who may have had such a case laid before counsel, ostensibly on his behalf but nevertheless without his knowledge.] The circumstances [stated, as those of the case,] may be wholly hypothetical; and in point of fact are often [purposely] distorted, for the sake of obtaining an opinion on events that are likely to arise. (*b*)

(*a*) 1 M. & K. 101; and see the remainder of the judgment, particularly, p. 110. [On this subject, in addition to the cases referred to above, the reader is referred to the following more recent cases, viz. Bussford *v.* Blakesley, 6 Beav. 131; Lopez *v.* Deacon, ibid. 254; Chidwick *v.* Prebble, ibid. 264; Hughes *v.* Garnons, ibid. 352; Holmes *v.* Baddeley, ibid. 521, reversed, ibid. 525; Hale *v.* Stewart, 1 Phill. 471. And the earlier cases, Greenlaw *v.* King, 1 Beav. 137; Combe *v.* London, Corp. of, 1 Yo. & C. 631, and Clagett *v.* Philippa, 2 Yo. & C. 82. And, for instances of the kind of communications not protected as privileged, the cases, at law, of Shore *v.* Bedford, 12 Law J., N. S. 138, (in C. P.), and Perry *v.* Smith, 1 Car. & M. 554, (in Q. B.)

As to cases and opinions of counsel thereon, some later cases seems to have almost set the matter at rest, for in Combe *v.* London Corp. of, heard on appeal, 20th Dec. 1845, Lord Lyndhurst, C. said, (the facts being fully set forth in the report of the case below, before the V. C. Knight Bruce, *ut supra*,) "With respect to the case and opinions, it is not necessary for me to express any opinion: they were considered by the V. C. to be protected, and the defendants, of course, do not complain of that decision; see also Nias *v.* N. and E. Railw. Co., 2 Keen, 76, (also affirmed on appeal) 3 Myl. & Cr. 355; Bolton *v.* Liverpool Corp. of, 1 Myl. & K. 88; Story *v.* Lennox Lord George, 1 Keen, 341; Ewing *v.* Osbaldiston, 6 Sim. 608. It has been held, that communications between the defendant and his solicitor, prior to the commencement of the suit, so far as related to advice and opinions touching the subject of the suit, were privileged; but not further or otherwise, although relating thereto: and it was held also, that no distinction existed between cases stated for the opinion of counsel and other communications; Walsingham Lord, *v.* Goodriche, 3 Hare, 122, but see Clagett *v.* Phillips, 2 Yo. & C. 82. It will be obvious how cautiously the draughtsman has to qualify and guard the admissions in an answer, even though some deficiencies in that respect may be supplied by affidavits.]

(*b*) [The resistance must be made on the motion for the production of the case or opinion; for where a case laid before counsel had been produced for inspection by the defendant, it was held

The defendant's most private affairs, or his confidential letters [and notes of communications] with persons not [in such a] professional [relation to him, as counsel, advocate, attorney, solicitor, proctor, or other recognised legal adviser,] have clearly no right of protection if they relate to the matter in dispute, or are mixed with any thing which the plaintiff has a right to inspect. (*a*) A steward who had received money and mixed it with his own was compelled to produce his banking books. (*b*) But leave will be given to a defendant producing books which contain [other matter besides] passages or entries relating to the matters in question, to seal up the parts which do not concern the plaintiff, pledging himself on oath (*c*) that he has sealed up those parts only. (*d*) So when extracts from letters on mercantile affairs were inserted in a schedule, and it was distinctly sworn [35]

Documents not strictly privileged.

it might be read on the part of the plaintiffs, on an application for a receiver; George *v.* Evans, 4 Yo. & C. 211. When a grantee of an annuity, anticipating, it would seem, that the validity of it might be questioned, through his solicitor took the opinion of counsel, and, after his death, his son, the assignee of the annuity, was made defendant to a suit respecting it; held this case and opinion were not privileged; and also that letters, &c. between the defendant and the solicitor not being his own solicitor also, but only his agent and friend, must be produced; Greenlaw *v.* King, 1 Beav. 137. And another instance of communications closely similar to, but not in fact, those which are privileged; see, as to report of medical officer of an insurance company, Desborough *v.* Rawlins, 3 M. & Cr. 515.]

(*a*) See Taylor *v.* Milner, 11 Ves. 41.

(*b*) Earl of Salisbury *v.* Cecil, 1 Cox, 278.

(*c*) [And, in general, on this motion affidavits by the defendant are admissible, to show a right to withhold production; see Llewellyn *v.* Badeley, 1 Hare, 527; Curd *v.* Curd, ibid. 274; Parsons *v.* Robertson, 2 Keen, 605. Or, on the ground of inconvenience, to obtain special indulgence as to the mode of production; Gardner *v.* Dangerfield, 5 Beav. 389.

When indulgence is granted on affidavit the costs are borne by the indulged defendant; see Smith *v.* Massie, 3 Beav. 417, and Gardner *v.* Dangerfield, *ut supra*.]

(*d*) Gerard *v.* Penswick, 1 Swanst. 455; Jones *v.* Powell, ibid. note. [But where memoranda, the production of which the plaintiff was entitled to, were entered in the same book with other matters, to a discovery of which the plaintiff was not entitled, and they could not be separated or sealed up; it was held that the defendant must suffer the inconvenience of his own act, and produce the whole; Carew *v.* White, 5 Beav. 172. A case, by the way, which all executors, trustees, &c. would do well to consider in making their memoranda, and all solicitors in advising such persons.

On a bill for an account of dealings between plaintiff and defendant, and to restrain an action brought by the defendant against the plaintiff, an order giving plaintiff liberty to inspect books having been obtained; it was held that the plaintiff was not entitled to inspect any portion of the books or papers, except those relating to the matters in question in the suit; and that for other matters, necessary to his defence in the action, he ought to have filed a bill for discovery; Rawson *v.* Samuel, 9 Sim. 442. And so with respect to private books relating to the general business of the defendants and in frequent use and not removable without inconvenience; the Court "will do what is usual in such cases, order that they shall be inspected at the office of the defendants at convenient times, and that such parts as do not relate to the matters in question in the cause may be sealed up on the usual affidavits"; Bute M. of, *v.* Glamorgan Canal Comp., 9 Jur. 1063 (on appeal).]

that they were all that related to the matters in dispute, a motion for the production of the letters themselves was refused. (*a*)

Right not reciprocal.

The right of inspecting documents, thus enjoyed by the plaintiff, is not reciprocal; documents which he admits by the bill to be in his own possession, will not be ordered to be produced for the inspection of the defendant; a cross-bill must be filed. (*b*) Unless indeed the defendant be unable to answer properly without them;—and then a motion that the Court will stay proceedings against him for not putting in a sufficient answer, until he has been assisted by an inspection, may be granted. (*c*) The reason of requiring a cross-bill is that Courts of Equity always think it right to give the party producing the document an opportunity of explaining on oath the nature of it, and of stating any circumstances connected with it. When a plaintiff at law founds his demand, in the declaration, on a written instrument, the Courts, acting originally, as Lord Eldon asserts, on an erroneous impression of the practice in equity, give leave of inspection to the defendant, in order that it may be seen by whom it was written, and whether on a stamp and with all the other requisites (*d*); but that modern doctrine of common law was not thought sufficiently safe to be followed in equity. In the case in which these observations were made, and in which the whole subject was very fully discussed, it was eventually ordered that the defendants should not be compelled to answer till a fortnight after the production of a certain paper by the plaintiffs. (*e*) But the Vice Chan-

(*a*) Campbell *v.* French, 2 Cox, 286. [Although an order in a former suit has not been acted on, yet one in a subsequent suit for production of the same documents is not prevented; Bourne *v.* Mole, 5 Beav. 417.

It is not a sufficient objection to an order for production, that the defendant's witnesses have been examined and the exhibits marked, enabling the plaintiff to ascertain what documents the defendant intends to produce at the hearing; Beaufort, D. of, *v.* Taylor, 2 Hare, 245.]

(*b*) Anon. Dick. 778; Spragg *v.* Corner, 2 Cox, 109; Micklethwayte *v.* Moore, 3 Mer. 292. [Such a motion was refused in Milligan *v.* Mitchell, 6 Sim. 186. In a suit for having partnership accounts taken, the plaintiff, although appointed receiver in the cause, cannot, before a decree, be ordered to produce books, &c., for inspection by the defendant; Maund *v.* Allies, 4 Myl. & Cr. 503.]

(*c*) Wy. Prac. Reg. 161; Pickering *v.* Rigby, 18 Ves. 484; Micklethwayte *v.* Moore, 3 Mer. 296.

(*d*) [*Vide supra*, p. 32, n. (*a*), where several cases are referred to. Notwithstanding the general rule, that a defendant is not compellable to discover matters showing that he has incurred penalties.]

(*e*) Wales Pss. of, *v.* Lord Liverpool, 1 Swanst. 114; and see the cases there cited.

[But *semble* that case was one of state policy; *et vide infra*, p. 45, n. (*a*).]

cellor Sir L. Shadwell in a later case (*a*) declared that he never could accede to that decision of Lord Eldon's, and ruled the contrary.

No order will be made respecting documents referred to in the depositions as exhibits, whether they be deeds or letters. (*b*) [36]

Deeds to be proved.

The circumstance of a deed's having come from the hands of the defendant does not dispense with the necessity of duly proving it; Lord Ellenborough exclaimed at the enormity of such a proposition; but on being informed that until it was produced in Court the plaintiff had been unable to learn the names of the witnesses, he put off the trial to give time. (*c*) A Court of Equity will, on motion of course, order it to be delivered out to the solicitor, or produced before the examiner or commissioners, that it may be proved, and that after this is done it may be returned. (*d*) But if it be a deed under which the defendant occupies or enjoys any other benefit, it need not be proved even at Law, (*e*) and in Equity [in such a case] it's validity will generally have been admitted in the answer. But the more convenient practice is for the original order, (that under which they are deposited with the officer of the Court), to contain also a direction for him to attend with them at the examiner's, and at the hearing of the cause. (*f*)

Order for depositing documents with the master.

On a special ground, of danger or of *mala fides*, the Court will go beyond its usual order (namely, that the documents may be inspected by the plaintiff and may afterwards be produced at the hearing), and it will have them deposited with the Master for safe custody. (*g*)

(*a*) Penfold *v.* Nunn, 5 Sim. 409; Lord Eldon himself (4 Sim. 324) discharged the order made in Jones *v.* Lewis, 2 S. & S. 242.

(*b*) Wiley *v.* Pistor, 7 Ves. 411; and the cases there cited. [As to exhibits generally and their proof, *vide infra.*]

(*c*) Gordon *v.* Secretan, 8 East, 548.

(*d*) Wy. Prac. Reg. 161.

[Papers which had been produced for inspection of the plaintiff were ordered, upon motion before the hearing, to be re-delivered to the defendant, to enable him to produce them before a commission to examine witnesses, he undertaking to return them, on the return of the commission; Jones *v.* Thomas, 2 Younge, (Ex. Eq.) 12.]

(*e*) Pearce *v.* Hooper, 3 Taunt. 60; and see 1 Stark. on Ev. 351.

(*f*) 1 S. Smith's Ch. Prac. 312. [The proper officer of the Court of Chancery to have the custody of exhibits is now the clerk of records and writs, by an Order of Oct. 1842, No. 3, Sand. Ord. 916, *et vide* Ibid, 937. As to his fees attending therewith, see same Orders, No. 8, *et vide*, Sand. Ord. Ind. *voce* Clerk of Records and Writs.]

(*g*) Addison *v.* Walker, 16 Ves. 440; and see Beckford *v.* Wildman, 16 Ves. 436; Tyler *v.* Drayton, 2 S. & S. 522. [So with a view to criminal proceedings being taken on them; Walker *v.* Corke, 3 Yo. & C. (Ex. Eq.,) 277;

Consequences of resisting the order.

If the party should venture to resist or should attempt to evade the order, he of course subjects himself to all the inconveniences of being in contempt. (*a*) There is a peculiar process for enforcing the production of documents before the Master, which does not seem to apply when they are only to be placed in the hands of the clerk in Court. (*b*) In one instance the [37] defendant was committed till he produced the deed inquired after, or admitted it to be as stated in the bill. (*c*) But in a great many instances all the purposes of the plaintiff are answered, by his having thus established a right to use secondary evidence at the hearing. (*d*)

[Some documents are privileged from production, from motives of public policy; (*e*) and we shall have occasion to resume the subject of privilege, in treating of the protection of witnesses on such grounds.]

and as to this, *vide* stat. 8 & 9 Vict., c. 113, providing against the forgery of the documents thereby made evidence. In a suit for an account of partnership matters, a defendant, having admitted by his answer, that he had incurred penalties, could not withhold the documents on the ground of their furnishing evidence which might subject him to them; Irving *v.* Osbaldiston, 6 Sim. 608. He had let the time for that objection pass by; as in George *v.* Evans, cited above. When a document, in the possession of the defendant, is produced and read at the hearing, by the plaintiff, under a general order for its production, the defendant will not be allowed to read from his answer any statement in explanation or qualification of the document, (or otherwise, except as to the possession of it); but the Court, if necessary, will direct an inquiry on the subject; Miller *v.* Gow, 1 Yo. & C. 56.]

(*a*) See the practice detailed in Edwards *v.* Pool, Dick. 693.

(*b*) [Or other proper officer, now the clerk of records and writs; *vide supra*, p. 45, n. (*e*).] See Carleton *v.* Smith, 14 Ves. 180. [As to production of documents before the Master, see an Order of 3rd April, 1828, No. 60; Sand. Ord. 725; and the subject discussed fully below.]

(*c*) Sanson *v.* Rumsey, 2 Vern. 61. [As to the four day order to enforce the production of documents, see Askew *v.* Peddle, 10 Sim. 182; Hobson *v.* Sherwood, 6 Beav. 63.

As to the costs of production and inspection of documents in particular cases, see Woodroffe *v.* Daniel, 10 Sim. 126, and Davis *v.* Harford, 3 Beav. 118.

As to the costs of affidavits to object to production, or obtain indulgence in extent or mode of it, *vide supra*, p. 43, n. (*c*).

(*d*) [As in Bush *v.* Peacock, 2 M. & R. 162.

As to secondary evidence, *vide infra*, P. II. ch. 3, § 2, n. (2).

As to admissions by parties not in the pleadings, nor by consent, but to be proved as facts, and also as to all admissions before the Master, *vide infra*.]

(*e*) [A correspondence between the Court of Directors of the East India Company and the commissioners for the affairs of India, in pursuance of stat. 3 & 4 Wm. 4, c. 85, held, on the ground of public policy, to be a privileged communication, &c.; Smith *v.* E. I. Comp., 1 Turn. & Phil. 50. The Bank of England however not being protected by any act of Parliament from the usual obligation of producing books of accounts, &c.; held to be bound to set forth, in answer to a bill of discovery of stock, a list of such books; Heslop *v.* Bank of England, 6 Sim. 192.]

CHAPTER II. [38]

ADMISSIONS MADE BY AGREEMENT, AND WAIVERS OF PROOF.

Mutual admission.

It often happens that it is advisable for each party to waive the necessity of proof, and to admit certain facts insisted upon by the other but insufficiently proved by the pleadings. (*a*) This may be either for the purpose of mutually avoiding the expense and delay of a commission for examining witnesses, or for the sake of respectively purchasing advantages by concessions; or of saving some expense to the estate; or there may be a mixture of these and other motives. To give one instance out of many; in a dispute about the construction of a will; it might often be advisable for the heir at law to waive his right of having its validity tried by an issue, at the expense, (if there should be a shadow of doubt,) of the estate; and at the same time he might fairly expect some admission of importance to his own case to be conceded to him in return. (*b*)

Form.

The form is usually extremely simple; but it ought to be full, to prevent mistakes. For example,

"We the undersigned, respectively Solicitors for the Plain-"tiff and Defendant in this cause, do hereby agree to admit "upon the hearing thereof and otherwise as may be necessary,

(*a*) [It may be convenient to mention here that, when a letter, from one of the parties to his opponent, is expressed to be "without prejudice," neither that, nor a letter in reply thereto, can be given in evidence, at law, on behalf of the writer of the first letter, even although the one in reply was not expressed to be "without prejudice;" Paddock *v.* Forrester, 3 Man. & Gr. 503.]

(*b*) [An Order of 1 Jac. 2, (13th July, 1685,) was made partly, perhaps, with reference to such agreements, *viz.*, "No agreement that shall hereafter be made between any of the clerks or solicitors in this Court, relating to any of their client's causes, shall be of any avail, unless such agreement, or some note or memorial thereof, shall be put in writing and subscribed by the party that is to be bound thereby;" 1 Sand. Ord. 365. And this having been "neglected to the prejudice of the suitors," by another Order of 19th March, 1697-8, Somers, C., it was ordered, "that the same should be revived, and the clerks and solicitors for the future duly to observe and perform the same; of which they were thereby to take notice, at their peril, that the clients might not, for the future, suffer through their defaults." Sand. Ord. 409.]

"That the several letters mentioned and referred to in the sche-
"dule hereunder written were respectively signed by the per-
"sons whose signatures they and each of them bear respectively;
"and that the said letters were respectively sent to, and received
"by, the persons to whom each of them were addressed respec-
"tively; and that the same shall respectively be read at the
"hearing of, or otherwise in, this cause, as either party may be
"advised, in the same manner as if the same had been respec-
"tively regularly proved; and that we will produce and permit
"to be read at the hearing of, and otherwise in, this cause,
[311] "such of the original letters respectively as are admitted in the
"copies thereof now signed by us respectively, to be in our
"respective possessions.

"A. B.
"C. D."

Waivers. In the same way, and for the same reasons, objections to evidence are often waived, and the examinations are allowed to stand for as much as they would have been worth if the defect had not existed. In either case, the extent of the admission or waiver will be accurately measured. Where, for instance, the execution of a deed is admitted, still any advantage may be taken of its being ill pleaded or essentially defective. (*a*)

Admissions by one party, If one party alone choose to make an admission or a waiver, as is often the case in an amicable suit, no sort of reciprocity or consideration is necessary to render it valid; satisfactory proof that the admission was made, is all that will be required. The signature of the solicitor is quite sufficient. (*b*) Lord Ellenborough, in a trial at law, said, (*c*) "If the fact is admitted by the attorney on the record with intent to obviate the neces-

(*a*) See Goldie *v.* Shuttleworth, 1 Camp. 70. [Where the parties agreed to admit in the cause certain facts, in the same manner as if they had been proved by proper and legal evidence; and, amongst other things, that a certain exhibit was a notice, and a certain other exhibit was a true copy of the lease referred to in the notice; it was held, that the notice was not evidence of the lease, so as to relieve the defendant from the necessity of calling the attesting witness; Mounsey *v.* Burnham, 1 Hare, 15; and that the admission, as to the copy of the lease, substituted the copy for the original, but did not place the copy in a better situation than the original would have been in, if it had been produced; Ibid.]

(*b*) [*Vide supra*, p. 47, n. (*b*), Order requiring signature.]

(*c*) Younge *v.* Wright, 1 Camp. 141. The law will infer that he had authority, Gainsford *v.* Grammar, 2 Camp. 13.

sity of proving it, he must be supposed to have authority for this purpose, and his client will be bound by the admission." Nor is it necessary to prove that he was the attorney of the party at the time when he signed the admission, if his name appear on the record when the cause is tried. The defendants were not allowed to object to the following undertaking put in as evidence of their ownership; "I hereby undertake to appear for Messrs. T. and M. joint owners of the sloop A. to any action you may think fit to bring against them. R. C." (*a*) Parol evidence of the fact that the admission was made is insufficient. Where the plaintiff's attorney swore that he had proposed that the defendant should acknowledge a warrant of attorney "so as to enable the deponent if it should become necessary, to enter up judgment thereon," and that the defendant had accepted his offer, Lord Eldon, C. J., considered it well proved that the defendant had agreed to acknowledge the instrument for all purposes: he even construed it very literally and held it agreed that the plaintiff should act upon the instrument without the necessity of producing the subscribing witness. (*b*)

[40]

Admissions and waivers controlled by the Court.

The Court however, although, in general, it encourages, as much as possible, the practice of making admissions, and of waiving proofs and difficulties, is bound to keep that practice within the bounds which the policy of the law requires. (*c*) This caution will be best exemplified by a reference to criminal trials. Lord Kenyon declared that "no consent on earth would warrant the examination of a witness on interrogatories in a criminal case." (*d*) In the Duchess of Kingston's trial two witnesses having submitted whether they ought to divulge confidential communications, the counsel for the prosecution [was willing to have] waived examining them, but the Lord High

(*a*) Laing *v.* Raine, 2 B. & P. 85.

(*b*) Marshall *v.* Cliffe, 4 Camp. 133. [But see Mounsey *v.* Burnham, 1 Hare, 15, cited fully above, that, in general, the admissions are not extended beyond the letter of the agreement.]

(*c*) [So that where the law requires an instrument to be stamped, in order to its validity, the Court will not give effect to an agreement between the solicitors to waive the objection arising from its not being stamped; see Owen *v.* Thomas, 3 M. & K. 353-7.]

(*d*) In R. *v.* Falkland Lord, Feb. 4th, 1795.

Steward (Lord Camden), after "acknowledging the politeness of the surrender," continued, "but, my Lords, you will give me leave to make one short remark on this proceeding, and to hope that your Lordships, sitting in judgment on criminal cases, the highest and most important, that may affect the lives, liberties, and properties of your Lordships, will not think it befitting the dignity of this high Court of justice to be debating the *etiquette* of honour, at the same time that we are trying lives and liberties. My Lords, the laws of the land, I speak it boldly in this grave assembly, are to receive another answer from those who are called to depose at your Bar, than to be told that in point of honour and of conscience, they do not think that they acquit themselves like persons of that description, when they declare what they know." The witnesses were accordingly examined. (*a*) Thus, in a civil suit, Lord Hardwicke refused to let a wife be examined on behalf of her husband, though all parties were consenting. (*b*)

[41]

Those of an infant not recognised.

In equity, the vigilance of the Court in this respect is most frequently exercised when the counsel of an infant is willing to admit or to waive points in his behalf. But as we have seen that the answer of an infant cannot be read against him, so neither can admissions by agreement, or waivers of any description. (*c*) Thus where the bill stated that a defendant was out of the jurisdiction, and all the other defendants admitted the fact in their answers, yet some of them being infants the Court could not act upon the admission. (*d*) So on a motion

(*a*) Howell's St. Tr.

(*b*) In Barker *v.* Dixie, Rep. t. Hard. 264; and see Owen *v.* Thomas, 3 M. & K. 357. [As to incompetency of certain classes of persons to give evidence, *vide infra*. As to this particular incompetency, originating, no doubt, in most wise policy of the law, see Langley *v.* Fisher, 5 Beav. 443. It has been lately not only expressly recognised, but, amidst great alterations, continued, by the late "Act for improving the law of evidence," (6 & 7 Vict. c. 85,) set forth fully hereafter.

So the ordinary right of a defendant in Chancery to refuse to furnish matter of discovery of the principal fact, or any one of a long series or chain of facts, which may contribute to establish a criminal charge against himself, he cannot waive by any agreement; Lee *v.* Read, 5 Beav. 381. Pending the proceedings in that cause, the plaintiff indicted the defendants, in respect of the same transactions; the time for answering was thereupon extended, until after the trial of the indictment; Ibid. But when only a mere liability to penalties would ensue, the rule does not seem to apply.]

(*c*) [Holden *v.* Hearn, 1 Beav. 445.]

(*d*) Wilkinson *v.* Beal, 4 Mad. 408; and see Townsend *v.* Ives, 1 Wils. 216.

that depositions taken in a suit to perpetuate testimony, might be published, the witnesses being still living, Lord Eldon said, "When this motion was first made, it occurred to me that the difficulty from what was represented as settled practice, not to publish depositions taken in a cause to perpetuate testimony, while the witness who made those depositions was living, might be got over by the fact that the defendants did not appear to oppose the motion: but upon the pleadings it appears that one of them is an infant; which produces the same difficulty as if all were so (*a*); for if the depositions ought not to be published, as affecting the interest of that infant, it is impossible to publish them by consent." (*b*) In the Exchequer there was a still greater strictness; "where an infant was a party and his interest was concerned, the Court did not allow of an order to examine a witness *vivâ voce* to prove a deed or exhibit, but the witness had to be examined in the office upon interrogatories." (*c*)

Practice in the Exchequer.

One consequence of this is that where there is an infant plaintiff the cause cannot be heard on bill and answer, but a replication must be filed and every point in the answer proved (*d*) And the same principle applies where there is an infant a co-defendant, as far, at least, as his interest is affected. In practice, however, objections which the infant might take are often waived by an arrangement among the solicitors; and if the Court does not discover, or does not interfere with, such arrangement, the infant will be bound by the decree: but the next friend will be liable afterwards to an action for damages at the suit of the infant. Sir John Leach, V. C., would not allow an arrangement of this kind to be called in question, declaring that "generally speaking, infants were bound, as much as adults were, by the conduct of their solicitor." (*e*)

Plaintiff an infant, cause cannot be heard on bill and answer.

[42]

(*a*) [*Semble*, as if all opposed.]

(*b*) Morrison *v.* Arnold, 19 Ves. 670; and see Perry *v.* Silvester, Jac. 83.

(*c*) Carleton *v.* Brightwell, 2 P. Wms. 463. [The Court of Exchequer, in one case, seems to have used like strictness where a married woman's separate estate was to be affected; Maber *v.* Hobbs, 1 Younge, 585.]

(*d*) It was so ruled by Lord Hardwicke, in Legard *v.* Sheffield, 2 Atk. 377; although in another case, Thurston *v.* Nutton, Sir J. Jekyll had decided otherwise, "with some warmth;" see a note, 3 P. Wms. 237, where other cases respecting infants are cited.

(*e*) Tillotson *v.* Hargrave, 3 Mad. 494; [As to infant parties, see Dan. Pr. Ch. c. 4, s. 8, Hoblam's Ed. p. 171, *et seq.*]

CHAPTER III.

EVIDENCE BY WITNESSES. (*a*)

Examination of Witnesses.

If the plaintiff is unable to obtain sufficient proof of his case to obtain a decree, either from the answers of the defendants, or from admissions by agreement, or if a defendant requires evidence to strengthen his position, the next step will be to [file replication, according to the order of May, 1845, (*b*) and proceed to] examine witnesses. (*c*)

Ancient modo of examining.

In ancient times the examinations in Chancery was in open Court before the Master of the Rolls,—in the Exchequer, before one of the Barons; and therefore it should seem, says Gilbert, C. B. that the examination might be upon the bill without interrogatories drawn and framed, as the examination with the canonists may be upon the *libellus articulatus;* but afterwards the Master of the Rolls having left the examination of the witnesses to his clerks, (*d*) as the Barons of the Exchequer did to theirs, from thenceforward the counsel for the party whose witnesses were to be examined, framed the interrogatories upon which the clerks examined. (*e*)

(*a*) [Some facts, at some stages of a suit, admit of proof by affidavit; as to which species of evidence by witnesses, *vide infra*, Ch. "Affidavit."]

(*b*) [No. 93; Sand. Ord. 1011.]

(*c*) [By an Order of 8th May, 1845, No. 16, of times allowed in procedure, s. 43, "After the replication is filed, parties have two months to examine their witnesses; and if such two months expire in the long Vacation, (which, by another of these Orders, No. 8, s. 3, commences on the 18th of August, and terminates on the 28th of October in every year; Sand. Ord. 983,) the time within which the parties are to examine their witnesses is extended to the second day of the ensuing Michaelmas Term;" Sand. Ord. 993.

By another of these orders, No. 120. Amongst matters to be allowed, in costs, between party and party, "Advising with counsel on the pleadings, evidence, and other proceedings in a cause;" is mentioned; Sand. Ord. 1019.]

(*d*) [The two Examiners admitted by the M. R.; see Sand. Ord. 11, n.]

(*e*) For. Rom. 125. Sometimes, in important matters, learned Doctors of Law were appointed to take the examinations; R. and Hunsdon *v.* Arundell, Hob. 112. [By the civil and canon laws, the witnesses are examined secretly by the Judge, in the presence of a notary, a mode different altogether from that used by the common law of England, and somewhat from that prevailing in those Courts of England where some parts of the civil and canon laws are still used. It is not the practice in such

Modern by Examiners and Commissioners.

These clerks have now become regular officers of the Courts, the Examiners (*a*): through whom in London, as through commissioners elsewhere, written answers are procured to written interrogatories. Such is the ordinary and almost invariable course of proceeding. The chief exception is that papers and documents which come under the technical description of Exhibits, are, under certain rules, allowed to be proved, *vivâ voce* at the hearing. (*b*)

Vivâ voce by the Court.

Attempts have been sometimes made to produce witnesses at the hearing to be heard at large *vivâ voce* by the Court, but it was peremptorily refused by Lord Hardwicke, (*c*) and the [44] power has never been exercised of late years, except for the satisfaction of the Court itself as to particular points. This [power and the occasions when it is exercised] will fall more properly within the third part of this work. (*d*)

Courts for the Judge in person to take the examination of the witnesses; that office is confided to one called an Examiner, who examines secretly; see *dictum* of Sir Wm. Scott, (afterwards Lord Stowell,) in Herbert *v.* Herbert, 3 Phill. R. 36. And, it seems, witnesses cannot be examined *vivâ voce* in those Courts; see Jones *v.* Yarnold, 2 Lus. R. 568, and see also Ingram *v.* Wyatt, 1 Hagg. 101.]

(*a*) [See stat. 50 Geo. 3, c. 164, local and personal. See Sand. Ord. 696, and Turner *v.* Burleigh, 17 Ves. 355, n. (*a*). An examination by an Examiner is called an "examination in Court."]

(*b*) [Or now, under an Order of 26th Aug. 1841, No. 43, by affidavit of the witness who would have been competent to prove the same *vivâ voce* at the hearing; Sand. Ord. 886, *et vide infra.*]

(*c*) In Graves *v.* Budgell Eustace, 1 Atk. 444.

(*d*) [P. 3, ch. 5, § 1; and see Turner *v.* Burleigh, 17 Ves. 355, and cases there cited. This power itself is not-to-be-doubtedly inherent in the Court, as it is further recognised by the Orders of 8th May, 1845, whereby, after providing, by No. 24, "that all writs of subpœna in this Court are to be prepared as therein mentioned," and, by No. 25, (when need requires it,) to be corrected and resealed; Sand. Ord. 995; the following is furnished as the appointed form, referred to in those Orders, of a "Subpœna to testify *vivâ voce* in Court, or to testify before the Master."—

"VICTORIA, &c.

To

WE command you, [and every of you,] that, laying all other matters aside, and notwithstanding any excuse, you personally be and appear before our Lord High Chancellor, [*or* before his Lordship or Honor the Master of the Rolls, *or* before Mr. one of the Masters of our High Court of Chancery, *or* before E. F. or G. H., commissioners named in a commission issued to them for that purpose,] at such time and place as the bearer hereof shall, by notice in writing, appoint, to testify the truth according to your knowledge, in a certain suit now depending in our High Court of Chancery, wherein A. B. [and others, or another, are *or*] is plaintiff [*or* plaintiffs,] and C. D. [and others, or another, are *or*] is defendant [*or* defendants,] on the part of the [In case of *subpœna duces tecum*, add, 'and that you then and there bring with you, &c.,'] and hereof fail not at your peril.

"Witness, &c. "DEVON."

—Sand. Ord. 1023.

In which form of *subpœna* it may be noted, by the way, the word "commissioners" provides for the case of the great seal being in commission, and is not, as at first might appear, meant to fit the form for a *subpœna* to testify, before commissioners in the country, of which hereafter, where see the form for that case.

It is intended here to consider first, the interrogatories themselves; next, the modes of Examination under them,—before the examiners of the Court, and before commissioners to examine witnesses; then, the publication of the evidence; and lastly, the proof of Exhibits.

SECTION I.

INTERROGATORIES. (*a*)

To be signed by counsel.

There is a general order that all interrogatories "shall be either drawn or perused by counsel (after due consideration had of the pleadings) and signed by them." (*b*) When a party

As to the examination of witnesses *vivâ voce* in the Chancery of Ireland, see O'Keefe's Ord. Ch. I. 33.]

(*a*) [As to the interrogating part of the bill, see Order of 26th Aug. 1841, in Sand. Ord. 879-80. By an Order of 13 Car. 2, 1661, Clarendon, C., "when the parties are at issue, and proceed to examine witnesses, the interrogatories are to be perused with care, that the same be pertinent and only to the points necessary, and the witnesses are to be sorted and examined on those interrogatories only that their testimony doth extend to, without the needless interrogatories of matters unnecessary and immaterial, as well to avoid the charge of both parties, plaintiff and defendant, in superfluous examinations, as that apt interrogatories, (*which are the life of the cause,*) may be exhibited; Sand. Ord. 301.]

(*b*) [*Et vide* Campbell *v.* Dickins, 3 Yo. & C. 720. An Order of 29th April, 1687, Jeffreys, C., runs thus:—"Whereas, by experience, great inconveniences have happened in several causes by the exhibiting interrogatories which are impertinently drawn into great length, whereby the suitors have been put to great and unnecessary charge; as also leading interrogatories, whereby witnesses, by turning the negative into the affirmative, are led to swear to the whole contents of an interrogatory, and oftentimes thereby drawn ignorantly to forswear themselves, which, in all times, have been suppressed, and deemed great abuses. Now for the prevention thereof for the future, IT IS THIS DAY ORDERED, &c., no interrogatories shall be exhibited for the examination of any witnesses in any cause depending in this Court, whether in Court, in the Examiner's Office, or by Commission in the country, before such interrogatories shall be either drawn or perused by counsel, (after due consideration had of the pleadings,) and signed by them. But, (adds the Order,) all counsel are to take care that no interrogatories do slightly pass their hands, contrary to the true intent and meaning hereof, lest they incur the displeasure of the Court therein. And that all depositions taken contrary hereto shall stand suppressed;" Sand. Ord. 375. As by the reasons of the law the law itself is best understood, we give this, and several other of the older Orders, in the original words, and deem a mere reference to the existence of such Orders quite useless to Counsel who are to be bound by them. This view of things, we trust, will be a sufficient excuse for much additional matter being inserted in this Edition, the fruit of diligent research, and yet, when once perused, hardly seeming to deserve more than a mere reference; our answer is,—a mere reference seldom leads to any useful application; *Eg.* Beames Ord. 273 and 311 was the reference which this and the last note supply the place of; what information, it may be asked, did such a reference afford?] And, [by the way,] Sir L. Shadwell, [now V. C. of England,] stated, [in his evidence] before the Chancery Commissioners, that "he had

to the suit is to be examined, and in certain other cases for which a special order is required, they must be settled by a Master. (*a*)

There must of necessity be an infinite number of forms in the framing of interrogatories, because there is no limit to the facts which may be their subject-matter. Moreover even a slight variation in the nature of the fact, or in the character of the witness, or in other less important particulars, will often entirely alter the form of interrogatory best suited for the occasion. Mr. Bell in his evidence before the Chancery commissioners says (*b*) "It is difficult to explain, unless a man is trying his skill as a draftsman against an unwilling defendant, how difficult it is often to extract the truth. I am certain, in such cases, the truth could not be extracted, except by very particular interrogatories;" and he goes on to state as the reason for his opinion, that in the Court of Chancery we have so often to deal with men who are dishonest or ignorant or prejudiced. (*c*) His observations, though made on the interrogatories in the bill, apply also to those for the examination of witnesses: not so strongly perhaps, because the defendant is almost always hostile and unwilling to say more than is necessary, while the witness is generally friendly and willing to say all that he can; but nearly so, because a cautious draftsman will never allow a risk to be run through confidence in the friendship and abilities of his witnesses: to interrogatories for cross-examination they are precisely applicable. Forms infinite. [45]

If this is borne in mind, and also that the Examiner or commissioner is bound to be satisfied with an answer, however meagre, if it strictly meets the question, and that although the witnesses may be numerous, only one set of interrogatories is allowed, the prolixity of a technical interrogatory with its numerous variations often verging on tautology, will be seen

always found, in the course of his business, the preparation of the interrogatories the most difficult thing the counsel has to do." [This being too generally experienced by each in his turn, the Editor hopes some apparent redundancy may be excusable, even if not absolutely useful.]

(*a*) *Vide infra*, P. III. ch. 5, § 2.

(*b*) App. 1, Q. 8.

(*c*) Ibid. App. 2, Q. 10.

to be absolutely necessary. Or if any person, after hearing, at a trial, the prevarication of one witness, and the difficulty of explaining a simple question to another, were to endeavour to frame an interrogatory on paper by means of which he could depend upon extracting satisfactory answers from both, he would soon find his language falling into forms similar to those in common use for examinations in equity.

Inconveniences.

After all, however, there is much truth in Lord Erskine's well known remark, (*a*) that it is "a frail and imperfect mode of examining into facts." (*b*) The Chancery commissioners frequently directed their attention to its inconveniences but were unable to suggest any practicable remedy. (*c*)

[46]

Difficulty of preventing evasion, &c.

The danger of leaving loopholes for evasion to an unwilling witness, or of insufficiently explaining the points to an ignorant one, will be best explained by an example. The following is taken from a set of interrogatories in a tithe suit:

"Did or did not the said defendant T. S., at any time or "times in any years or year since he hath entered on the estates "late of the said Sir S. A. pay or cause to be paid to the "rector of the said parish of B. any and what sum or sums of "money for the tithes of wood by him felled or cut down in "such years or year? and if not, then hath or hath not the "rector of the said parish of B. at any time, and when in "particular, made any and what composition with the said "defendant T. S., or with any and what persons or person on

(*a*) In White *v.* Wilson, 13 Ves. 87.

(*b*) Some of its practical inconveniences are thus described by Mr. Vizard the solicitor, who had had many opportunities of observing its workings; "a regular set of interrogatories is prepared beforehand, dressed up in such language that I have often found it exceedingly difficult to render them intelligible to the witness: those interrogatories are prepared not to meet the evidence supposed to come from one witness, but a variety of witnesses, all speaking partially to the same point, though not precisely to the same," &c. &c. Ch. Com. App. 45, Q. 153. And see Mr. Plumer's account, referred to below.

(*c*) [By an Order of 11 Car. 1, 1635, Coventry, K., No. 3, "interrogatories for examining of witnesses to be drawn only upon points material, and not upon matters which are either confessed in the pleadings or are impertinent and needless to be proved, &c." The next order is still more quaint—No. 4, "when the parties are at issue and do proceed to examination of witnesses, either in court or by commission, as the interrogatories are to be pertinent and material, so the witnesses are to be sorted by those that produce them that they may be examined upon such interrogatories as are proper and fit for them, and not to examine a multitude of witnesses upon a multitude of questions altogether unknown to them, as is too frequently done. Upon pain, &c. Sand. Ord. 177. It seems the late order, as to prolixity, &c. omits this case; see Sand. Ord. 1019.]

"his behalf, for the tithes of the lands and grounds within the "said parish of B. formerly the estate of the said Sir S. A.? "and if so, set forth the particulars of such composition; and "in case the same should be a composition by the acre, then "set forth what part or proportion of such composition was "given or allowed in respect of, or by way of recompense and "satisfaction for, the tithes of the wood from time to time cut "down and felled by the said defendant, and by what mode of "computation, or upon what principles and in what way was "such composition estimated and made? and particularly, was "or was not the tithe of the wood to be cut down by the said "defendant in the contemplation of the parties at the time of "making such composition? and if so, then what allowance "was to be made to such parties in respect of such tithe of "wood? Declare," &c.

Supposing the fact to have been that a composition was usually paid for these woods, then if the interrogatory had merely inquired whether the owner paid tithes, an unwilling witness might have evaded giving any information by a simple negative; and again, if the inquiries about the mode of composition had been less particular, an unprofessional witness would very probably not have given half the necessary information respecting it. (*a*)

[47]

Leading questions; in substance;

Another danger arises from the rule that evidence given in answer to leading questions will be suppressed. (*b*) Leading questions are defined by Phillipps to be "such as instruct the "witness how to answer on material points." (*c*) This is extremely vague: (*d*) but it is impossible that a definition should be otherwise whose real point is the fairness or unfairness of the question, *secundum arbitrium boni viri.* At a trial, the constant watchfulness of the adverse counsel prevents any material evil from arising; the Judge instantly interposes and allows or disallows the question before the answer is given, and there is

(*a*) See Q. 11, &c., in Mr. Bell's evidence, Ch. Com. App. 2, 3. The rules of the Court are very strict against allowing omissions to be supplied; *vide infra.*

(*b*) *Vide infra.*

(*c*) 1 Phil. on Ev. 255.

(*d*) [Perhaps the vagueness imputed to the definition of Mr. Phillipps may be got rid of by adding after the word how—"he is expected" or "wished."]

virtually no appeal from his decision. In equity, the question is certain to be answered; and when the defect is discovered (by the examination being referred to the Master (*a*) and certain interrogatories being reported by him to be leading), there is the inconvenience of proceeding to the hearing without this evidence or of being put to the delay and expense of procuring it again in a more proper manner. Caution therefore in this respect is necessary to be observed in the original framing of the interrogatories.

Up to a certain point it is absolutely necessary to lead a witness, or it would be impossible for him to know upon what matters he is to give his information; but when the very words of his answer become material, then the interrogatory ought to be general, and ought not to suggest to him ideas or forms of expressing them. One in which were these words, "in order "to bring him to England by force or in chains," was in consequence disallowed. (*b*)

in form.

[48]

Nor is the substance only to be considered; although it may be sometimes absolutely necessary to bring material points to the mind of the examinant for the purpose of informing him of the object of the inquiry, yet if they are put in a form which suggest the answer, as "Did you not see?"—"Have you not heard?"—and so forth, the interrogatory would be the more readily disallowed. (*c*) If however the evidence appears to be material for essential justice, and the leading to have been through inadvertence, the Court will allow a new set of interrogatories to be prepared for the same purpose by the Master. (*d*)

Scandalous, &c.

Interrogatories will also be suppressed for scandal, and [other] impertinence, (*e*) and for other causes which will be

(*a*) In the Exchequer to the Deputy Remembrancer.

(*b*) Nash *v.* E. I. Co., 2 Fowl. 154; [Aylward *v.* Kearney, 2 Ball & B. 463. Interrogatories in the form, "was it so agreed," not being suggestive of the answer, nor "whether such an event happened," held, not leading; Lincoln *v.* Wright, 4 Beav. 164;] see 1 Stark. on Ev. 3rd Ed. 169, [where the whole of this subject is discussed elaborately and yet learly.]

(*c*) [See the Order of Lord Jefferys cited above, p. 54, n. (*b*).]

(*d*) Arundel Lord *v.* Pitt [the defendant being an infant], Ambl. 585; Mentill *v.* Payne, 3 Anstr. 923; Spong *v.* Allen, Ch. Pr. 493; and some cases, from Fowler, collected in 2 Chit. Eq. Ind. 1065.

(*e*) [See Lord Coventry's Orders, *ut supra*, p. 56, n. (*c*). But it seems that interrogatories cannot be referred for any impertinence short of scandal;

discussed in the following chapter. (*a*) The circumstances also under which they may be demurred [or rather objected] to by the witnesses will be considered in the following section.

Form of heading.

The forms of heading sets of interrogatories will be seen in the specimens in the Appendix. Great care should be taken; for a mistake in the Christain name of the plaintiff in the heading, has been considered fatal to the whole.(*b*)

First interrogatory.

There is no particular utility in the interrogatory with which a set is always commenced; at least in its bare form "Do you "know the parties complainant and defendant in the title to "these interrogatories named, or either, and which, of them? "and how long have you known them respectively, or such one "of them as you do know?" It is a mere introduction to the rest; (*c*) unless where inquiries into the business, or age, or identity, &c. of an individual, or similar matters, are added.(*d*) Nor is there much advantage in the custom of ending each interrogatory with general words to this effect, "Declare the "truth of the several matters in this interrogatory inquired after "according to the best of your knowledge, remembrance, in-

White *v.* Fussel, 19 Ves. 113, *et vide* Pyncent *v.* R., 3 Atk. 557. Nor can it be construed to be considered as a species of impertinence, that many witnesses are examined as to the same facts, provided the facts be pertinent and in issue; Vaughan *v.* Lloyd, 1 Cox, 313; when otherwise, see the Order cited p. 56, n. (*c*)]

(*a*) [As to prolixity as distinguished from what is strictly speaking impertinent; see an Order of May, 1845, No. 122; Sand. Ord. 1019; but *semble*, it is not applicable to interrogatories or depositions.]

(*b*) White *v.* Taylor, 2 Vern. 435; [see also Pritchard *v.* Foulkes, 2 Beav. 133; Jones *v.* Smith, 3 Yo. & C. 42.]

(*c*) [As to proof of identity, Mr. Hubback, in his valuable work on the Evidence of Succession, remarks, that "On entering into evidence, in equity, the first interrogatory is always framed to identify the parties to the suit, by means of the personal knowledge of the witness, and thereby to lay a foundation for the questions which follow. In some of these, (he adds) it is also frequently necessary to interrogate as to the witness's knowledge of the testator, intestate, or other material person appearing in the cause. When the identity of devisees, legatees, or objects of a trust or limitation, or of heirs or next of kin is doubtful or not admitted the first general interrogatory is seldom relied upon, but it is deemed advisable to have special interrogatories to establish the facts." Hub. Ev. Suc. Pt. 2, ch. 6, p. 442.]

(*d*) [By an Order of 2 Car. 1, 1035, Coventry, C., it was directed, "That the articles which are usually thrust into the beginning of every schedule of interrogatories, as it were of form or course, touching the witnesses' knowledge of the parties, plaintiffs, and defendants of the lands, towns, and places in the pleadings, and the like, be not so needlessly used as they are. But if, for cross-examining any witness or for other special reason, it shall be necessary to minister any such questions, every man is left at liberty to do therein as much as shall be pertinent and needful in a due and fitting place. And if any shall offend against this, the party, and such as draw the interrogatories, shall be punished by paying as much as the other side is by that means overcharged in copies and further as the case shall merit." Sand. Ord. 177.

"formation, and belief, with your reasons fully and at large." These forms, as well as the formal parts of bills and answers, would probably soon fall into disuse if the remuneration for
[49] equity-drawing were to be estimated according to the difficulty of a draft instead of the length. (*a*)

Last interrogatory.

But the general interrogatory which usually ends the set is of real importance. In its old form, it called upon the examinant to set forth any thing which "could in anywise tend to the benefit or advantage" of the party for whom he appeared. These words were understood literally by the examiners, (*b*) and if any evidence was offered as an answer to this question which would manifestly have been detrimental to the party who had produced the witness, they refused to take it down; but they allowed any quantity of information which seemed likely to benefit him to be inserted there. It was therefore material that the question should be carefully worded, lest the benefit of this caution on the part of the examiners should be lost.

An order of 21st December 1833, Lord Brougham, C., is framed with a view to remedying the evils which arise from this practice, but it is not compulsory upon the examiner to put it, and a party would naturally avoid, if possible, a question which might so easily be detrimental to him. (*c*) The order is as follows, "The last Interrogatory now commonly in use be in "future altered, and shall stand and be in the words or to the "effect following: Do you know, or can you set forth, any "other matter or thing which may be of benefit or advantage "to the parties at issue in this cause, or either of them, or that "may be material to the subject of this your examination, or to

(*a*) [This principle has been lately recognised to a certain extent, as to certain conveyancing business, by the stat. 8 & 9 Vict. c. 124, s. 3, as to remuneration for preparing and executing (it should rather be seeing or procuring to be executed?) any deed under that act: but imperfect as the mere length of a draft may seem to be, as a measure of remuneration, the *difficulty* of the task performed is still less capable of being appreciated by any one, even by the subtle and experienced draftsman himself; and the ridiculous attempt to turn the *quiddam honorarium* of counsel into nicely calculated remuneration, like wages, for work and labour done, smacks rather of the covetousness, than the intelligence, of the age we live in: but, if these acts ever come to be used at all, taxing masters are to be the fee meters as between counsel and client!]

(*b*) See Mr. Dancer's evidence Ch. Com. App. 295, Q. 34, &c.

(*c*) [Although a party is not now at liberty to use the *old* form, he is not compelled to use any, and therefore may waive using this *new* one; Gover *v.* Lucas, 8 Sim. 200.]

"the matters in question in this cause? if yea, set forth the "same, &c." (*a*)

Cross-interrogatories.

A broad rule has been laid down that a witness can be cross-examined on the same points only on which he has been examined in chief, (*b*) and generally speaking it holds good; (*c*) a totally new line of examination would not be allowed to be introduced in a cross-examination, but the witness must be examined in chief on the new matter and subjected to a cross-examination from the other party. (*d*)

[50]

But few rules are strictly observed in cross-interrogatories. For instance, with regard to leading, when the witness is cross-examined as to the circumstances of the fact, all the particulars of time and place may be mentioned to him. Again with regard to materiality, the commonest of all cross-examinations is an investigation into the competency of the witness himself, (*e*) a matter entirely beside the point at issue.

Interrogatories on special motion.

Interrogatories on special motions are set still more free from the above mentioned rules. By them a witness may be examined as to the character and credit of other witnesses, although the very same interrogatories have been struck out of the examination in chief as irrelevant. (*f*)

SECTION II.

EXAMINATION OF WITNESSES.

[Perhaps next should follow all relating to witnesses; but the original arrangement of the work postpones that part of the subject, and it would be inconvenient to alter it.]

(*a*) [This laudable attempt to meet the apparent inconvenience of the old system has been successful, although in a manner different from what was most probably expected by the reformer. An interrogatory used for the last having omitted the words, "or either of them." On the motion of the late Mr. Wakefield, Q. C., the interrogatory and the depositions taken with it were suppressed! Peacock *v.* Kernott, V. C. E., 21 Nov. 1845.]

(*b*) Dean and Chapter of Ely *v.* Sir S. Stuart, 2 Atk. 44.

(*c*) [How else would it be cross-examination?]

(*d*) [As to cross-examinations in the Chancery of Ireland, see Sandford *v.* Seymour, 2 Moll. 392; Keogh *v.* Pentland, 3 Moll. 44; Aylward *v.* Hickson, 2 Hog. 1. And in bankruptcy, *ex parte* and *re* Palmer, 1 Deac. & Ch. 373. in the Exchequer, Maber *v.* Hobbs, 1 Yo. 585.]

(*e*) In fact, cross-examination, except on this point, has fallen very much into disuse; *vide infra.*

(*f*) Mill *v.* Mill, 12 Ves. 406.

In the mode of applying the interrogatories when prepared consists one of the most material differences between [the practice in] common law and equity. (*a*) There are [it may be] great defects inherent in each system. The almost invariable rule of the former, that the witness shall be confronted with the tribunal in open Court, has this among its consequences, that the evidence of many is [perhaps more likely to be] entirely lost by sickness, distance, collusion, violence, or accident: (*b*) in the latter there is the evil [that except in the few cases when the power of examining the witness *viva voce* in open Court is exercised which, as we have observed, is so seldom as to be hardly ever] that the Judge has not an opportunity of seeing and questioning the witnesses; but then [there is this convenience] the examination [of the witnesses] may take place in whatever part of the world they may be.

Town causes.

If they reside within twenty miles of London, or if the party producing them choose to bring them to London with their own consent, they will be examined by the regular Examiners of the Court; (*c*) otherwise a Commission to examine witnesses must be issued. (*d*) The practical difference between these two kinds of machinery is very considerable. They will require

[51]

(*a*) [As an instance of the care of the Court in the "search after truth," by means of evidence; where owners and occupiers of houses in London, subject to tithe, were defendants at suit of the tithe-owner, they were ordered to permit witnesses to inspect them preparatory to examination on interrogatories for proving their value; Kynaston *v.* E. I. Comp., 3 Swanst. 218; see this on appeal, 3 Bli. 153, *et sic in similibus.*]

(*b*) [Although precaution may have been taken, in some of these cases, to examine the witnesses *de bene esse.*]

(*c*) [By an Order of 37 Hen. 8, 1545, "No commyssyon to be granted *ad examinandum testes* but for impotency and age or ells by the great distance of the waye, and according to the old order of the Court;" Sand. Ord. 9. Another Order, of 17 Jac. 1, 1619, refers to this "auncient order," and the limit of twenty miles as the distance; Sand. Ord. 123. And another Order, of 5 Car. 1, 1629-30, reprehends the infringement of the rule, and Sir Julius Cæsar, M. R., adds, "for the parties to disclaim the sworn officers of the Court constituted for the purpose without any just exception against them, giveth cause to suspect the same to be done for sinister purposes, examinations in Court being always esteemed better and more indifferently taken than by commission." Sand. Ord. 165. These old orders seem to throw light on modern practice, therefore we extract these passages from them; availing ourselves of the valuable work of Mr. Sanders, where they are fully set forth.]

(*d*) [By an Order of 20 Car. 2, 1668, Sir Orlando Bridgman, K., declared he saw no cause, but Examiners might proceed to examine in the country; and ordered accordingly, but without prejudice to the six clerks; Sand. Ord. 327. This course, however, seems to have been long ago abandoned by the Court of Chancery; see Gilb. For. Rom. 143. But if, from any cause, not dependent upon the parties or upon one party more than another, such as disagreement among the commissioners, the commission cannot be executed; it is said the Court will send down an examiner into the country; Prac. Reg. 126; Hind. 358; 2 Dan. Pr. Ch. 520.]

on every ground to be separately treated of; but much that in the working of the machinery is common to both will be placed under the latter head (*a*) as being [there] more likely to be useful to the Profession generally.

The Examiners attached to the Court of Chancery are two in number; they are appointed by, and in fact act as deputies of, the Master of the Rolls. (*b*) Sir Thomas Clarke, M. R. said, "The Examiner writes in my name, and is, and acts as, my deputy; he is the same as the persons in the Roman law called *co-judices*." (*c*) Lord Alvanley, M. R., says of them, "When the office of Examiner became first established, is not quite clear; but as to examinations before a decree, there must have been either sworn officers of the Court, whose duty it was to examine, or there must have been a special authority to the Master or some other person to examine. It was not incident to the Master's duty to examine previously to a decree. The office of Examiner is very ancient; and undoubtedly they are the persons who ought to examine all witnesses, except such in the country whom the Court gives an express authority to examine." (*d*) In the Exchequer each Baron had the power of appointing a clerk as an Examiner, but the business, of late years, had not been more than can be performed by the one Examiner appointed by the Chief Baron.

The Examiners number of,

The following is the statement of his own and his colleague's duties which was returned to the Chancery Commission by Mr. Plumer: (*e*)

duties of.

"The Examiners are two in number; one examines the plaintiff's witnesses, the other the defendant's. (*f*) A set of interrogatories, engrossed on parchment, with counsels' name attached, is brought to the office by the solicitor and lodged with the sworn clerk. This is called filing interrogatories." (*g*)

Mr. Plumer's return.

[52]

(*a*) [Without concurring altogether in the opinion expressed by Mr. Gresley, his arrangement has necessarily been followed out.]

(*b*) *Vide supra*, p. 52, n. (*d*).

(*c*) Darling *v.* Staniford, Dick. 358.

(*d*) In Parkinson *v.* Ingram, 3 Ves. 606.

(*e*) App. B. no. 22, p. 542.

(*f*) *Vide infra.* [But by Ord. of 3rd April, 1828, the Examiner, who examines in chief, may also cross-examine; Sand. Ord. 718.]

(*g*) If some witnesses are to be examined in London and some in the country, it is not necessary to file the whole set at the Examiner's office, but such only as are wanted; Hinde's Ch. Pr. 320, n.

"The Solicitor at the same time, usually makes an appointment for the attendance of the witnesses to be examined upon them, (*a*) and secures one, two, or more days, as he supposes the examination will occupy. (*b*) Upon the witnesses' attending

(*a*) [But should he doubt whether one whose testimony is required, will, without being compelled, keep such appointment, he will, even at the risk of offending, cause such an one to be duly served with a *subpœna ad testificandum*, or, if required to bring with him any document in his possession, a *subpœna duces tecum*, along with a notice in writing of the time when he is to attend the Examiner, in obedience to the writ.

The following is the appointed form (under the Orders of May, 1845) of a *Subpœna ad testificandum* and *Subpœna duces tecum*:—

VICTORIA, &c.

To Greeting.

"We command you, (and every of you,) that, laying all other matters aside, and notwithstanding any excuse, you personally be and appear before Mr. one of the Examiners of witnesses in our High Court of Chancery, at his office in Rolls' Yard, Chancery Lane, London, at such times as the bearer hereof shall, by notice in writing, appoint, (*or*, before E. F. or G. H., Commissioners appointed for the examination of witnesses in our Chancery, at such times and places as the bearer hereof shall, by notice in writing, appoint,) to testify the truth, according to your knowledge, in a certain cause depending in our said Court of Chancery, wherein A. B. (and others, or another, are *or*) is plaintiff, (*or* plaintiffs,) and C. D. (and others, or another, are, *or*) is defendant, (*or* defendants,) on the part of the (In case of *subpœna duces tecum*, add, 'and that you then and there bring with you and produce,' &c.) And hereof fail not at your peril.

"Witness, &c. "DEVON."

—Sand. Ord. 1023.

As to filing, indorsement, service, number of names in, and costs of writs of subpœna, see Orders of May, 1845, No. 15, s. 1; Sand. Ord. 985; and see Orders of Dec. 1833, Nos. 2 to 6; but No. 1 and No. 7 of those Orders are altered respectively by Ord. of May, 1845, Nos. 24 and 25, and No. 24 and s. 46 of No. 31; Sand. Ord. 775-6 and 995.

As to what documents a witness served with a *subpœna duces tecum* is not compellable to produce; see Att. Gen. *v.* Wilson, 9 Sim. 526. And, at law, as to documents not mentioned in the notice to produce, but which the witness brought into Court, being under the control of the Court; see Snelgrove *v.* Stevens, 1 Car. & M. (N. P.) 508. Again, in equity, A. B., and C., having been formerly, and C., D., and E. being now partners in a firm; in a suit against the partners of the old firm, the plaintiff served D. and E., and also an agent of the new firm, (none of whom were parties to the suit,) with a *subpœna duces tecum*, requiring them to produce certain books of the late firm, and he also moved, that C., the partner in both firms, might be ordered to concur with D. and E., partners in the original firm only, in the production of the books: the motion was refused, with costs; Stuart *v.* Bute Lord, 13 Sim. 452. At law, though a witness might incur detriment, still he must produce a book; see Doe d. Egremont, E. of, *v.* Dale, 3 Ad. & E., N. S. 609. And, at law, when an attorney has a lien on a deed for costs of preparing it, he is not bound to produce it when served with a *subpœna duces tecum* for his client; Kemp *v.* King, 2 M. & Rob. 437; S. C., 1 Car. & M. 396.]

(*b*) During the examinations, the witnesses are protected from arrest; Sidgier *v.* Birch, 9 Ves. 69; List's case, 2 Ves. & Bea. 374; Franklyn *v.* Colquhoun, 1 Mad. 580. But a person who has been served with a *subpœna ad testificandum* in London, and is at the time resident there, is not protected from arrest in the interval between the service of the *subpœna* and the day appointed for his examination. It would appear, however, that a witness who comes to London in order to be examined, is protected from arrest during the whole time that he remains in London *bonâ fide* for the purpose of giving evidence; though he is not protected in going, three days before the

they are taken up by the sworn clerk to the six clerks' office, and produced at the seat of the Clerk in Court for the opposite party; (*a*) and a note (*b*) of the name, residence, and description of each witness is left there. (*c*) From the six clerk's office the witnesses proceed with the same officer to the public office, where they are sworn before the Master in Chancery, (*d*) who certifies that fact, by affixing a memorandum of it upon the interrogatories, (*e*) in the following form:

Witnesses' note of name, &c.

"A. B. and C. D., both sworn (*f*) before me at the public office, this day of " (Signed).

Sworn.

day appointed by the Examiner for his examination, to the solicitor's office to look at the interrogatories, with a view to prepare himself to give his evidence accurately; Gibbs *v.* Phillipson, 1 Russ. & M. 19.

(*a*) [According to an Order of 1661, Clarendon, C.; Sand. Ord. 301.]

(*b*) [The note, enjoined by an Order of 1685, to be "not only of the name and title of such witness, and the parish where he lives, but, if the parish be one within the bills of mortality, such note shall also contain what street and house in such parish such party lives in, and whether he be a housekeeper or a lodger; to the end such witness may, with more ease, be inquired after and cross-examined, if required. And the clerks are to see this Order performed"; Sand. Ord. 364.]

(*c*) But an Order of 3rd April, 1828, No. 25, directs, "That no witness to be examined before either of the Examiners for any party in a cause, be in future produced at the seat of the Clerk in Court for the opposite party; but that a notice in writing, containing the name and description of the witness, be served there as heretofore;" [Sand. Ord. 718. And, as to the form of the note, *vide supra*. And, by an Order of 26th Oct. 1842, No. 26, "the solicitor for the party examining any witness before one of the Examiners, is to serve the *usual* notice in writing, containing the name and description of such witness, upon the solicitor or solicitors of the adverse party or parties in the cause"; Sand. Ord. 923.]

(*d*) But now, by the stat. 3 & 4 Wm. 4, c. 94, s. 27, the Examiners themselves are authorized and empowered to administer the usual and accustomed oaths, and to take the usual affirmations of the witnesses examined before them.

(*e*) [By an Order of 17th Nov., 1635, Coventry, K., No. 8, "witnesses only to be examined on the interrogatories exhibited before they were sworn;" Sand. Ord. 178, *sed vide infra*.]

(*f*) [The witness must be sworn, even though he be a peer; who is entitled to put in an answer in Chancery on his honour; see Dan. Pr. Ch. by H. 698–9. However, it may be observed, by the way, that even a sovereign prince, also a peer of this realm, suing in the Court of Chancery, submits to the jurisdiction, and a cross bill being filed against him, he must answer it on oath; Brunswick, D. of, *v.* Hanover, King of; 6 Beav. 1; the present King of Hanover being Duke of Cumberland, &c. Lord Keeper Harcourt held, the privilege of peerage did not extend but to putting in an answer, although the House of Lords, by an Order in 1640, had claimed a much wider privilege; see this Order of the House in Sand. Ord. Ch. 207: and, as to answers, see an Order by the House in 1685, in Sand. Ord. Ch. 365; which seems, by implication, to waive the rest; whilst as to affidavits, and where the peer is examined as a witness, his lordship must be upon oath; Mears *v.* Stourton, Lord, 1 P. Wms. 146, S C. 2 Salk. 512, given differently in Dick, 21. Mr. Gresley, in n. (*a*) to p. 78, of the first edition of this Work, adds to the citation of this case as above, "but a few years afterwards, the House of Lords, (on the 22nd May, 1732,) resolved, "that it was the inherent right of all peers or lords of parliament, to answer or be examined upon interrogatories, in all Courts, upon protestation of honour only, and not on the common oath; of which notice was to be given to all judges, that the same might be heard and recorded in the several Courts." This order is not noticed in Sand.

[53] "The examination bears date from the time of the witnesses being sworn, though they may, perhaps, not be examined for several days afterwards.

Ord Ch. The reader will not fail to notice in this Order the term "lords of parliament," as it seems to include the bishops, who are undoubtedly such, though not strictly peers; see Staundf. P. C. 153. And, by the way, the Order of the House in 1640, alluded to above, claims this right expressly for all "the nobility," and particularizes "widows and dowagers of the temporal peers of the land;" Sand. Ord. 207. However, that peers are examined on oath; see 2 Howell's St. Tr. 772; and Dan. Pr. Ch., by H., 865.

[Jews, Turks, Infidels and Heretics, and indeed, to use the vulgar phraseology, "persons of all denominations," excepting only utter Atheists, (or such as profess so to be,) may be witnesses; Omichund *v.* Barker, 1 Atk. 21; S. C. 1 Wils, 84; S. C. Willis, 538; as to the credit due to each, that is a matter quite distinct from their admissibility, and one we may hereafter advert to: each and every witness must, however, have an oath administered to him, in some form or other, such as he recognises as binding on his conscience; except indeed he be of one of those more favoured sects, whose more sensitive consciences the Legislature has, since the Revolution, endeavoured to ease, by substituting, by statutes we shall refer to, what are called affirmations for oaths; a distinction however, as it seems, with hardly the shadow of a difference.

And first of these, one of the Jewish persuasion is to be sworn on the Pentateuch, with his head covered; Anon., 1 Vern. 263; 1 Atk. 40, 42; Willis, 543; Cowp. 389. But a converted Jew, just like any other Christian. R. *v* Gilham, 1 Esp. N. P. C. 285. A Turk or other Mahomedan on the Koran; Morgan's case, 1 Leach C. C. 64; Cowp. 390; Fachina *v.* Sabine, 2 Str. 1104. An Infidel must be followed as far as he may have gone off from the faith, if only he still holds the opinion, that the Almighty is the avenger of falsehood, and that he may take an oath in some form; see Ruston's case, 1 Leach, C. C. 455. And so also a Heathen, as a Gentoo, whose deposition was taken after having washed the foot of a Brahmin; see Omichund *v.* Barker, 1 Atk. 21; S. C. 2 Eq. Ab. 397; Wil. Rep. 538; 1 Wils. 84. And a Chinese was sworn by dashing a saucer on the ground after taking the oath; in R. *v.* Alsley, O. B. Sess., 1804; Peak. Ev. (5th ed.) 138. And in general, indulgence is extended to individuals whose scruples extend only to the form of oath, or whose consciences require any particular form; as in Dutton *v.* Colt, 2 Sid. 6; and see *dictum* of Gould, J., in Mildrone's case, 1 Leach, C. C. 459; and Mee *v.* Reid, 1 Peake, N. P. C. 22, where kissing the book was objected to, and another form permitted. But if the scruples go so far as, or happen to be, that no form of oath whatsoever will suit the witness, for that he holds no oath to be binding, or if he will not be sworn though he admits some form would bind him, then great difficulty may arise, not only his evidence may be lost, but he may be liable to all the loss thereby sustained by the party; because, as yet, the Legislature has not gone quite so far as to provide, that all affirmations are of like force with solemn oaths. Now and then a witness refuses to take any oath at all, alleging a general scruple, without being able to assert himself to be one of any of the favoured sects of (so called) Christians, (Heritics and others) whose consciences are already provided for by the Legislature. It may suffice in this place briefly to refer to the stat. 7 & 8 Wm. 3, c. 34, whereby the "solemn affirmation" of Quakers was admitted to have the like effect with an "oath" in civil cases; the stat. 9 Geo. 4, c. 32, and that of 3 & 4 Wm. 4, c. 49, whereby the principle (or relaxation of principle,) was extended to criminal cases, and Moravians (so called) admitted to like favour; to stat. 3 & 4 Wm. 4, c. 82, extending it to Separatists (so called); and a later stat., 1 & 2 Vict. c. 77, providing similar indulgence for any person who has been a Quaker or Moravian, (omitting, it would seem, the case of one who has been a mere Separatist,) and still has scruples preventing his taking an oath as an oath; see Doran's case, 2 Lewin's C. C. 27; 2 Moo. C. C. 37. The (so called) liberality of the present age will doubtless soon remove all this difficulty; and indeed one learned Judge has lately expressed his regret that the Legislature had not already done so. As to persons that go under the name of Quakers, by the way, see some curious and artful devices of theirs to avoid

"If the witness is prevented, by age or infirmity, from attending in person, an order is obtained that he may be examined at his own residence; (*a*) and in that case the Master in Chancery attends there to administer the oath, (*b*) and the Examiner to take his deposition. Witnesses examined at home if aged, &c.

"If, after the witnesses have been sworn, any alteration is made in the title or any other part of the interrogatories, they must be resworn, but not reproduced. Interrogatories, title, &c.

"Before the witnesses are examined, the Examiner ought to be, and generally is, furnished by the solicitor with instructions as to which of the interrogatories each witness is to be examined upon. Instructions to Examiner.

"The solicitor also supplies a minute of the evidence he expects his witnesses to give; but of such paper no use can be made in the examination. (*c*) On the return of the witnesses to the Examiners' office, from being sworn, (*d*) they are examined separately, and in secret, (that is, without any third person being present) (*e*) by the Examiner, who reads over the interrogatories Minute of evidence. Examination of.

taking oaths to their answers in Chancery, and the mode adopted by the Court, for frustrating their knavish tricks, in an Order of 28 Car. 2, April 10th, 1676; Sand. Ord. 348-9. It is by that Order directed, that the Masters (and the hint seems one likely to be useful to the other officers) of this Court, are "to be very circumspect, careful, and wary in the administering of oaths to all persons whatsoever, that the same may be administered *reverently*, and according to law." To conclude this long note, we will but add that the stat. 1 & 2 Vict. c. 105, enacts, "that in all cases in which an oath may lawfully be administered to any person, either as a juryman, or a witness, or a deponent, in any proceeding, civil or criminal, in any Court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every person, in case of wilful false swearing, may be convicted of the crime of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted." As to a child's competency to be sworn, see Rex *v.* Williams, 7 Car. & P. 320. Further, on this subject, the reader may refer to Stark. on Ev., 3rd ed., p. 93, *et seq.*, and Phill. on Ev. 9th ed., ch. 2, p. 7, *et seq.*]

(*a*) [On affidavit of the witness's incapacity to travel, an Examiner ordered to attend him; Anon. 4 Mad. 463.]

(*b*) [Now unnecessary as any Examiner can do it; *vide supra*, p. 65, n. (*d*).]

(*c*) [So in the Ecclesiastical Courts, what is there technically called a designation of the witnesses is used; that is, the proctors on each side set down a full statement of what each witness can say, which is given to the Examiner to examine by: but this has been characterized as a very irregular and dangerous practice; *per* Sir John Nicholl, in Bennett *v.* Jackson, 11 Phill. R. 394.]

(*d*) [Or now, after having been sworn, *vide supra*, p. 65, n. (*d*).]

(*e*) [An Examiner was committed and discharged from his office for permitting a person to come in and refresh the memory of an aged and infirm witness; Mos. 321: *et vide* Shaw *v.* Lindsay, 15 Ves. 381; Atty. Gen. *v.* Nethercote, 10 Sim. 311. As to what

successively, and takes down the answer in writing, concluding the answer to each interrogatory before the following one is put. (*a*) The Examiner considers himself bound, and strictly bound, to adhere to the record; but if an ambiguity occurs in the interrogatory, and the witness does not strictly comprehend its meaning, the Examiner feels himself at liberty to give an explanation; (*b*) and if necessary, as is frequently the case with country witnesses and unprofessional persons, to couch it in less technical and more familiar language; taking care however that the answer ultimately elicited and recorded, shall be strictly an answer to the terms of the interrogatory. (*c*)

[54]

Depositions read and signed.

"When all the interrogatories, upon which the Examiner was intrusted to examine the witnesses have been thus gone through, the Examiner carefully reads over the whole deposition to the witness, (*d*) who, if he be satisfied with it, signs each sheet of

documents a witness may refer to, by way of refreshing his memory, whilst under examination at law, memoranda &c., see Higgs *v.* Taylor, 1 Car. & K. 85; newspaper &c., Topham *v.* MacGregor, ibid. 320; a previous examination on the subject before commissioners of bankrupts; Wood *v.* Cooper, ibid. 645. He is not allowed to use a paper written by himself, unless so written cotemporaneously with the transaction; Steinkeller *v.* Newton, 9 C. & P. 372: and see Herne *v.* Mackenzie, 6 Cl. & Fin. 628, in Dom. Proc.; and, as to a reference to books as to dates &c., in the Courts Ecclesiastical, see Rutlin *v.* Barry, 1 Curt. 617.]

(*a*) [By an Order of 1661, Clarendon, C., "For preventing perjuries and other mischiefs, often appearing to the Court, the Examiner is to examine the deponent to the interrogatories directed *seriatim*; and not to permit him to read over or hear read over any other interrogatories until that in hand be fully finished; much less is he to suffer the deponent to have the interrogatories and pen his own depositions, or depart after he hath heard an interrogatory read over until he has perfected his examination thereunto. And if any witness shall refuse so to conform himself, the Examiner is thereof to give notice to the clerk of the other side, and to proceed no further in his examination without the consent of such clerk or order made in Court to warrant his so doing." Sand. Ord. 302.]

(*b*) [Another Order of 1661, runs thus:—"The Examiners (in whom the Court reposeth much confidence) are themselves in person to be diligent in examination of witnesses, and not to intrust the same to mean and inferior clerks; and are to take care to hold the witness to the point interrogated and not to run into extravagances and matters not pertinent to the question, thereby wasting paper for their own profit, of which the Court will expect a strict account." Sand. Ord. 302. Again, that the Examiners have a care of their clerks and be answerable for them, is provided for by the next order; Sand. Ord. 302. Whilst another of these same Orders provides, "That in examining witnesses, the Examiner shall not use any idle repetitions or needless circumstances, nor set down any answer to the questions to which the examinant cannot depose other than thus: *To such an interrogatory this examinant cannot depose, &c.*"; Sand. Ord. 302-3, where, see these Orders at full length for the particular information of those whom they more principally concern.]

(*c*) Though the witness be a foreigner, who does not understand our language, the examination must still be in English. The interrogatories must be translated into the language of the deponent, and his answers translated into English, by a sworn interpreter; Lord Belmore *v.* Anderson, 4 B. C. C. 90; Smith *v.* Kirkpatrick, Dick. 103.

(*d*) [By stat. 3 & 4 Wm. 4, c. 94, s. 27, the depositions are to be taken in the first person (this, which, until an Order

it in the presence of the Examiner. If, however the witness, upon consideration, wishes to vary his testimony or to make any alteration in or addition to it, he is at liberty to do so before signing the deposition. (*a*)

Depositions altered or added to.

"After the deposition has been signed, and the witness has left the office, the rule is almost invariable, that no further alteration or addition can be made without special leave of the Court. The only exceptions are where a witness, speaking from recollection of the contents of a written document, finds, on referring to the document, that he has made a mistake in a date or sum. Upon the document being produced to the Examiner he considers himself at liberty to correct the error. (*b*) Or where the witness can satisfy the Examiner, that the statement sought to be examined [qu: added] was actually made to the Examiner during the examination, but inadvertently omitted to be taken down by him; the Examiner considers that he may supply his own omission: (*c*) the principle in both cases being that the evidence could not be of subsequent manufacture. (*d*) The same witness cannot be re-examined upon the same

of May, 1845, No. 107, was confined to those taken before the Examiners; see Dryden *v.* Frost, 8 Sim. 380) is now extended to "all depositions"; Sand. Ord. 1016.]

(*a*) [If the witness dies after examination, but before such is signed by him, it cannot be used; Copeland *v.* Stanton, 1 P. Wms. 414; and see Nolan *v.* Shannon, 1 Moll. 157, in the Chancery of Ireland.]

(*b*) [These exceptions seem to have been owing to an Order of 17th Nov. 1635, Coventry, K., No. 9 (not however expressly recognised by the Order of 22nd May, 1661, Clarendon, C.) viz., "that when witnesses are examined in Court," (*i. e.* by the Examiner), "they shall perfect and subscribe their depositions unto such interrogatories as they have answered before they depart from the Examiner or his deputy, and shall not be permitted to make any alteration thereof at any time after, without leave of the Court;—unless it be some circumstance of time or the like, or for making perfect of a sum upon view of any deed, book, or writing, which the witness shall show to the Examiner before he admit such alteration." Sand. Ord. 179.

Where, by reason of the witnesses not having had an opportunity of inspecting drafts of deeds, although marked by the Examiner, as having been produced to them, the former examination was nugatory, a re-examination was allowed as to them, the other party having liberty to cross-examine; Stanney *v.* Walmsley, 2 Myl. & K. 361; see also Kirk *v.* Kirk, 13 Ves. 280; ibid. 285; Byrne *v.* Frere, 1 Moll. 396; and as to examination before commissioners' re-examinations, allowed on surprise, &c. and evidence allowed on special order; *vide infra.*]

(*c*) [Where the witness omits to answer some part, that omission may be supplied on a reference back to the Examiner, obtained by motion; Potts *v.* Curtis, 11 Ves. 343.]

(*d*) [Upon an affidavit of the witness that the Examiner had mistaken him, his deposition was amended, in Penderil *v.* P., Kelynge, 25; but a similar application was refused, in Traberne *v.* Burdres, ibid. 26. And a motion to amend depositions after publication was refused, in Ingram *v.* Mitchell, 5 Ves. 297.]

interrogatories or to the same matter, without an order of the Court; but he may at any time before publication passes, be examined upon any one or more of the interrogatories already filed, upon which he was not previously examined: or additional interrogatories may be filed for the further examination of a witness previously examined, provided they are not to the same points. (*a*)

Cross examination.

"If the opposite party intends to cross-examine, notice of that intention is left with the Examiner who examines the witnesses in chief; (*b*) the cross interrogatories are filed with the other

(*a*) [And *à fortiori*, additional interrogatories may be filed for the examination of witnesses not previously examined; that is, until publication; for by an Order of 29th Jan. 1618-9, Bacon, C., No. 74, "No witness shall be examined after publication, except it be by consent, or by special order *ad informandum conscientiam judicis* and then" (*i. e.* in the latter case) "to be brought close sealed up to the Court, to peruse or publish as the Court shall think good." Sand. Ord. 119. Here we see plainly recognised the sole ground for any departure from this rule, viz., the satisfaction of the Court; and observe that the prohibition of examination after publication extends, 1st, to the examination of new witnesses; 2ndly, to the examination, on new matters, of the same witnesses; and 3rdly, *à fortiori*, to the re-examination of the same witnesses, on the same matters; but as we shall show, leaves all these within the bounds of possibility "by consent or by special order," leaving it in the latter case for the party applying to the Court, to show how far the rules may and ought to be dispensed with.

Again, by an Order of 17th Nov. 1635, Coventry, K., No. 8, the Court limited the power of examination of witnesses (new or the same, if before the Examiner) to examination on the interrogatories exhibited "before they were sworn." Sand. Ord. 179: now by an Order of 7th Nov. 1637, Sir Dudley Digges, M. R., explained this last order to mean that no new interrogatories should be exhibited for the examination of *new* witnesses *after* publication; Sand. Ord. 201; see also Lewes *v.* Owen, ibid. and S. C. Dick. 6. So that, as to *new* witnesses, until *after* publication, interrogatories might be exhibited at any time; for it would of course be before the new witnesses had been sworn, and so not prohibited by the order thus explained: but this explanation left it as an undoubted principle that, *after* publication no witnesses could be examined; for as to that, see not only the old orders, quoted above, but the one we now come to, viz. an Order of 22nd May, 1661, Clarendon, C., in these words, "Where witnesses are examined in Court" (*i. e.* before the Examiner) "upon a schedule of interrogatories" (*i. e.* alluding to the then practice) "there shall be no new interrogatories put in to examine *the same* witnesses." Sand. Ord. 301. This seems to leave it open to file, from time to time, and without further order, fresh interrogatories to examine *new* witnesses at any time prior to publication, which time however is expressly referred to, as the limit, by the same order, which adds, "nor shall *any* witness be examined in Court *after* the day of publication, &c." (adding a proviso now no longer applicable); Sand. Ord. 301. And thus arose the practice (called feeding the Examiner) alluded to below. Pending an examination in Court (*i. e.* before the Examiner) new interrogatories may be exhibited from time to time for the examination of the same or other witnesses (on matters as to which they have not been already examined); but not before commissioners, without leave of the Court; Hanover, K. of *v.* Wheatley, 4 Beav. 78; Cowslade *v.* Cornish, 2 Ves. 270, and if liberty is given to a party to exhibit further interrogatories, he may examine a witness whom he has examined before, on new matters; Turner *v.* Trelawney, 9 Sim. 453.]

(*b*) [The party desiring it must make the appointment with the Examiners and give notice to the witness and the solicitor of the opposite party; Keymer

Examiner; (*a*) and the witness after having completed his examination in chief attends at the other office to be examined upon them. (*b*) [55]

"The depositions when taken, remain with the Examiner, who is bound by oath not to communicate their contents to either party, until the time expires within which, according to the rules of the Court, both sides must have concluded their evidence. (*c*) Publication (as it is termed) then passes. This time is frequently extended by order or consent of parties. (*d*) When publication has passed, the Examiner gives out the original depositions to the sworn or copying clerk, who makes

Depositions, disposal of.

Publication.

Copies.

v. Pering, 10 Sim. 179. As to cross-examination generally, *vide supra*, p. 61. If a defendant to a bill for discovery and a commission, examine in chief, instead of confining himself to cross-examination, he shall not have costs; Anon. 8 Ves. 70.]

(*a*) This was done in accordance with the spirit of the statute 50 Geo. 3, c. 164, which enacts in § 11, "that the witnesses on different sides of the same cause shall (if the same be practicable) be examined by different Examiners." [With regard to cross-examination, as to the execution of deeds, an order was made in the alternative that the Examiner with whom they were should cross-examine, or that they should be delivered to the Examiner of the other party for that purpose; Turner *v.* Burleigh, 17 Ves. 354; and the like rule existed in Ireland, see Ord. Ch. I., March, 1806, O'Keefe's ed. 103.] But by an Order of 3rd April, 1828, No. 26, "the Examiner who shall take the examination in chief of any witness shall be at liberty to take his cross-examination also." Sand. Ord. 718. This alteration was recommended by the Chancery Commission, on the just ground of its being ridiculous to suppose that the Examiner was likely to become a partisan. [And see some observations of the late Sir Sam. Romilly, in Turner *v.* Burleigh, 17 Ves. 356.]

(*b*) [The party examining a witness is bound to keep him in town eight-and-forty hours after his production at the seat of the adverse clerk in Court (or now the giving the usual notice as aforesaid); and if cross-interrogatories are left with the Examiner within the eight-and-forty hours, the party must keep the witness in town, until his cross-examination is finished: and if the witness departs, the party must bring him back, at his own expense, or the depositions in chief will be suppressed; Whittuck *v.* Lysaght, 1 S. & S. 446. A witness having been examined in chief, who, before being cross-examined, secreted himself; an order was made that unless he was produced within a fortnight after notice, his depositions in chief should be suppressed; Flowerday *v.* Collet, Dick. 288: and see Charlton *v.* Robson, 2 Fowl. 158; Spalding *v.* Bragham, ibid. 158, and Johnstone *v.* Carruthers, ibid. 159.]

(*c*) [By an Order of 13 Car. 2, Clarendon, C., "The Examiners are to take care that they employ under them in their office, none but persons of known integrity and ability, who shall take an oath not to deliver or make known directly or indirectly to the adverse party or any other, save the deponent, who comes to be examined, any of the interrogatories delivered to be examined on, any examination by him taken or remaining in the Examiner's office, or extract, copy or breviate thereof, before publication be thereof passed and copies thereof taken. Under pain, &c." Sand. Ord. 303: and see Lord Coventry's Orders to like effect; ibid. 185; and an Order as to copies of depositions; ibid. 152. That witnesses ought not to disclose their evidence to the parties, see Cooth *v.* Jackson, 6 Ves. 33.]

(*d*) [As to publication and enlarging the time for the same, *vide infra*. See an Order of 28th Nov. 1743, as to examining clerks; Sand. Ord. 570-1, and also one of 22nd April, 1811, Eldon, C., as to the mode in which the business of examination on interrogatories should be carried on in the Examiner's office; Sand. Ord. 696.]

copies of them for the parties, when ordered by them. To the copy of the depositions made for the opposite party, a copy of the interrogatories is added; but the party who filed the interrogatories does not take a copy of them. (*a*) Each copy is signed by the Examiner, to authenticate it: and upon its being taken away, the fees due to the office are paid. (*b*) Every document or exhibit, referred to in the depositions, is also signed by the Examiner, before it is returned to the party producing it." (*a*)

The difference between these duties and those of the Examiner of the Court of Exchequer were very trifling. The witnesses were taken before a Baron to be sworn (as they were in Chancery before a Master) and the proceeding was styled an Examination before a Baron. (*d*)

The very sensible and practical observations which follow apply equally to both. They are contained in the same return of Mr. Plumer, from which the preceding extract has been taken; and ought always to be borne in mind by counsel, when drawing interrogatories.

Inconvenience of the system.

"It seems to be pretty generally felt in the profession that the system of taking evidence in Chancery is, to say the least, a very imperfect one, and its inefficiency to elicit truth, wherever there are disputed facts and conflicting testimony, is fully avowed by the admission that in all such cases recourse must be had to an issue. (*e*) It is not likely that the result should be satisfactory, where the means taken to arrive at it are

[56]

(*a*) [By an Order of 28th Nov. 1743, Hardwicke, C., Sand. Ord. 571, varying an Order of 4 & 5 Ph. & Mary, ibid. 19.]

(*b*) [As to fees in the Examiner's office, see the Orders of 15th April, 1844, Sand. Ord. 963, 966, and 971.]

(*c*) [As to the proof of exhibits, *vide post.*]

(*d*) See 2 Fowler, 133. [And see, some remarks made by Sir Wm. Scott (afterwards Lord Stowell) on the duties of an Examiner in the Ecclesiastical Courts; Evans *v.* Evans, 1 Hagg. Con. Rep. 96, 97, and see also Ingram *v.* Wyatt, 1 Hagg. Rep. 103.]

(*e*) [An avowal, in some cases grounded upon the presumption that it may be easier for a jury to be satisfied, one way or the other, than for a judge; but, in fact, the principle seems to be, *First*, when the evidence is conflicting, a decision touches on the credit of some or all of the witnesses; and by a jury only should the credit of an Englishman of unimpeachable character be weighed; see the observations of C. B. Gilbert, cited above, p. 5, n. (*b*) of this edition: *next*, perhaps, the Court of Equity may incline to doubt, after considerable investigation, and therefore hesitate to decide the question on the evidence, however satisfactory, without assistance: and *lastly*, it must be confessed, to delegate it to a jury is an easy mode of evading a task odious at best, and one which however well done cannot be tested and which will therefore scarcely ever be so done as to satisfy the losing party.]

so defective. Any person in the habit of examining witnesses *vivâ voce*, knows how each succeeding question is dictated by the preceding answer, and will feel how impossible it must be, by any set of prepared questions, how acutely and ingeniously framed, to anticipate and provide for the turns and varieties which occur in almost every examination. Besides, in Chancery the material from which counsel prepare the interrogatories, are extremely meagre; their instruction very frequently being, 'Please to advise upon evidence, and draw Interrogatories 'accordingly.' (*a*) A technical set of questions is then prepared, to prove a certain set of facts, without counsels' knowing what witnesses are to be called; and the same artificial interrogatory is constructed for witnesses of all different capacities. However wide the interrogatory is of the real facts, the Examiner cannot vary it to meet them; sometimes it is so cramped, that the statement of the witness cannot be admitted under hand, sometimes it is so vague, that the point inquired after is not apparent, and an indefinite indistinct answer (especially where the witness is an adverse one) is the result. (*b*) The great nostrum for supplying all the deficiencies in the particular interrogatories is the last general one; by which the witness, who has been sworn to tell the truth and the whole truth, is required to state only so much of it as he may think beneficial to the party for whom he is examined. (*c*) But this most frequently fails of its object. The witness either forgets the statement intended to be supplied, and which a more direct question would have extracted: or else cannot take upon himself to judge what would be beneficial, or injurious, to the party calling him. From the [57] artificial and technical form and language, as well of the interrogatory as of the deposition, it is impossible to convey to the

(*a*) [And counsel may expostulate in vain; *vide infra.*]

(*b*) A witness is never allowed, in an ordinary examination, to bring what he intends to depose written down upon paper, though he may use short notes to refresh his memory; he must not, however, copy them out verbatim. Wy. Prac. Reg. 125; [*et vide supra*, p. 67, n. (*d*); see also the Order of 1661, quoted above, p. 68, n. (*a*);] Shaw *v.* Lindsay, 15 Ves. 382; [Att. Gen. *v.* Nethercote, 10 Sim. 311, but see the note, ibid. 313; *et vide infra*, Suppression of Depositions.]

(*c*) [This form being altered, though whether improved or not seems doubtful, by an Order of 21st December, 1833, Brougham, C., Sand. Ord. 786; *et vide supra*, p. 60, n. (*d*).]

Court the full force of the witnesses' expressions; and the operation of recording the testimony is frequently more like drawing an answer in Chancery than any thing else." (*a*)

"After hearing the interrogatory read over, the witness often enters into a long detail, part of which is, and part is not admissible under the interrogatory; and from that narrative the Examiner has to extract and shape a full, but pertinent answer to the questions on the record. Again, the liberty a witness has of varying and altering his testimony before signing the deposition, (*b*) without those variations and alterations appearing to the Court, forms a serious objection to the present system of taking depositions. Shuffle and prevaricate as a witness may in the course of the examination, he can correct all the inconsistencies between one part of his evidence and another; and his testimony as finally presented to the Court in the office copy, will read as fluently as that of the most honest plain spoken witness that was ever examined.

"The secrecy too of the examination appears, to say the least of it, of very doubtful policy. (*c*) It throws an extremely heavy responsibility on the Examiner. If a witness has omitted to mention, or the Examiner to take down a material statement, or if the witness has misconceived the question, or the Examiner his answer, the defect is but rarely discovered, till it is too late to supply or correct it. (*d*) Sometimes the case is overloaded with evidence, and much of unimportant matter taken down, from the party's not knowing what has been proved as the
[58] examination proceeds; in other instances the case is defectively proved, through the unexpected failure of a witness, whose

(*a*) This last inconvenience is [partly] remedied by the stat. 3 & 4 Wm. 4, c. 94; which enacts, s. 27, "that all depositions of witnesses examined in the High Court of Chancery shall be taken in the first person."

(*b*) Commissioners being [or at least being apt to be] in some degree partisans are more jealous of allowing alterations; see the next section.

(*c*) [Witnesses in the ecclesiastical Courts also are examined secretly; such is the form and rule of the canon law: it is to be observed, however, that the secrecy enjoined by the civil and canon laws is varied by the local regulation of different countries; it is not to be interpreted exactly the same in any one country as in another, see the observations of Sir Wm. Scott, afterwards Lord Stowell, in Herbert *v.* Herbert, 3 Phill. R., p. 36.]

(*d*) [The object of taking evidence in secret is to prevent attempts to support defective evidence already given; but further inquiry, when necessary, is not refused; Walker *v.* Wingfield, 18 Ves. 443; as to further examination, and in certain rare cases, re-examination of the same witness, *vide infra*.]

testimony, had such failure been known in time, might have been corroborated or supplied.

"But the glaring defect in the system of taking evidence in Chancery, and that which renders it insufficient for the elucidation of truth, is the total exclusion of any thing like an effective cross-examination. Each party is ignorant, not only of what the witnesses on the other side have said, but of what they have been asked. In such total darkness, a cross-examination is seldom attempted; the most experienced practitioners, I believe, recommend it only in cases where the witness is one whom it would be necessary or prudent to have examined in chief: (*a*) and the result of almost every cross-examination which I have seen ventured upon, has confirmed the wisdom of that advice. The magnitude of such a defect needs no comment. It leaves the examination in Chancery a mere *ex parte* proceeding, and little better than evidence by affidavit." (*b*)

Mr. Dancer's opinion.

The evils are put forcibly in the foregoing extract [from Mr. Plumer's remarks]. It should however be observed that, either from the nature of the business which ordinarily comes before the Courts of Equity, or from some other cause, very little inconvenience appeared to the other Examiner Mr. Dancer, after twenty years' experience, to have arisen from the prevarication of witnesses. And the Chancery Commissioners seemed to think so little of the evils complained of, that they did not recommend any important alteration in the practice. (*c*)

Remedies.

In fact a remedy is supplied to some of the above mentioned defects by allowing under special circumstances a re-examination, or sometimes even a cross-examination, after publication. (*d*)

Other remedies by alterations in the law were suggested by Mr. Plumer, and by others: such as that the Examiner should

(*a*) Mr. Bell says, "I never in my later practice ventured to cross-examine a witness, unless he was a witness whom I would otherwise have examined in chief; or to extract some fact to show that he was interested." Ch. Com. App. p. 6, Q. 49.

(*b*) [Accordingly, on motions and petitions the evidence is by affidavit, and, on a reference to the Master, may be so. As to affidavits generally, *vide infra.*]

(*c*) See their Report, p. 13 and 14.

(*d*) [*Vide supra*, p. 69, n. (*a*), n. (*b*), and n. (*c*). And, as to re-examination, see also Dan. Pr. Ch. by H. 942, *et seq.* Ibid. 1141, *et vide infra*, P. III. ch. 5, where the Court requires further information.]

[59] have the power of administering an oath, and should possess some means of compelling the witnesses to attend. The former has been adopted and embodied in the stat. 3 & 4 Wm. 4, c. 94, § 27. This saves to those who give evidence at the Examiner's office, the time previously occupied in attendance on the Master; and if a witness is ill it saves the expense of the Master's visiting him at his residence. The latter would prevent the cumbrous process now resorted to in the case of a reluctant witness; first of serving on him a *subpœnâ ad testificandum*, with notice in writing of the time and place of examination and a tender of his expenses; (*a*) then, if he should refuse to attend, or attending should refuse to be sworn, of applying to the Court (on certificate from the Examiner of such refusal, and affidavit of service of the *subpœnâ* and the notice) that if he remain contumacious four days he may stand committed: (*b*) and afterwards of a second application to the Court for his committal. (*c*) Any powers that might be given for the remedy of this evil ought also to extend to the case of a witness prevaricating or answering evasively; conduct which cannot now be punished except by the Court, on certificate from the Examiner.

Limited discretion of Examiners.

There is one point in which considerable benefit would probably be felt if the law, without being altered, were to be ascertained and defined by two or three decisions; the power of the Examiners or commissioners to reject evidence of which they have good reason to doubt the validity, is so uncertain that they are unwilling to act upon it. (*d*) Lord Eldon indeed said that "he had not a conception of a rule that would be

(*a*) Solicitors are in many instances unwilling to serve a witness with a *subpœna ad testificandum*, lest he should come reluctantly, and not give so good an evidence.

(*b*) Osman *v.* Fitzroy, 1 Dick. 60; Hemegal *v.* Evance, 12 Ves. 201. [A witness who had answered some of the interrogatories, but refused to answer the others, was ordered to answer those within four days, or stand committed, in Austin *v.* Prince, 1 Sim. 318; *et vide* Dolman *v.* Pritman, 3 Ch. Rep. 64; Anon., 2 Freem. 134; Humble *v.* Malbe, Cary, 41; Middleton *v.* Speright, Ib. 80.]

(*c*) See 1 Harrison's Ch. Pr. 493; [and Dan. Pr. Ch. by H. 860, *et seq.*; *et vide supra.*]

(*d*) [A witness was examined under a commission, and swore reflecting words; and yet he was held not liable to pay the costs; it being the fault of the commissioners to take down such depositions; Anon., 2 P. Wms. 406.]

more mischievous, than that commissioners should be bound to devest themselves entirely of all discretion as to what is, or is not, legal evidence:" and that "he should introduce a most severe scourge by obliging commissioners to take all that is offered them, whether it may have the character of evidence or not."(*a*) But the sentence which immediately follows is a proof of the sparing exercise which was then made of that discretion; and the practice has not altered since. "It very seldom happens," he continues, "that depositions are brought here without much trash in them, that is not evidence." It is true that one consequence of a greater boldness on the part of the Examiners would be that applications might sometimes be made to the Court to compel them to receive evidence which they had rejected. (*b*) But on the other hand it is likely that if the Examiner possessed the confidence of the profession, points would often be submitted to his decision, such as whether a question about to be asked be leading, or whether a witness about to be examined be, under admitted circumstances, competent; and that thus considerable time and expense would eventually be saved. (*c*)

[60]

DEMURRER TO INTERROGATORIES.

Demurrer to an interrogatory by a witness.

A reluctant witness has it now in his power to try some points which affect the validity of his testimony, by the process called a Demurrer to Interrogatories. (*d*)

(*a*) Whitelock *v.* Baker, 13 Ves. 515. [Under a commission for the examination of witnesses, several on the part of the defendant appeared and were examined on the part of the plaintiff, the plaintiff at that time declining to examine them, but, on further consideration, he examined them up in town at the Examiner's office: their depositions were not suppressed; Pearson *v.* Rowland, 2 Swan. 266.]

(*b*) [Which would necessitate a disclosure of the evidence before publication, contrary to the fixed principles of the Court.]

(*c*) [As to competency, the stat. 6 & 7 Vict. c. 85, cited below, has made a very extensive alteration. And whether an interrogatory be, in its form, too leading may surely be left to counsel. It does not occur to the editor of this edition that any occasion would arise to call for the decision of the Examiner on such matters.] For some other points on practice, which are as applicable to examinations taken by the Examiner as to those taken by Commissioners; such as the allowing a witness to correct his testimony, &c. &c.: see the following section.

(*d*) [The witness is said to demur, *demoratur*, *i. e.* he rests or abides on the

Nature.

The law on this subject is collected in the case of *Parkhurst* v. *Lowten*, (*a*) prior to which it had fallen very much into disuse. (*b*) Lord Eldon, in his judgment, says, "The cases cited have settled the practice of the Court. We proceed, as far as possible, by analogy to law. At law the witness swears [61] to the facts which privilege him, (*c*) and the Court then decides the question of privilege. (*d*) Objecting to answer concerning facts which came to his knowledge as solicitor, he must swear that he acted as solicitor, and that he so acquired [all] the knowledge [he has]. (*e*) In this Court, the only way in which a witness can protect himself, [where examined in Court or in the country] is to state his objection before the Examiner or the commissioners; the commissioners in a country cause return the commission with what is called the witness's demurrer, (*f*) and the question is brought before the Court, by setting that

Name.

down for argument. (*g*) Certainly it is not, strictly speaking, a demurrer, which is an instrument that admit facts stated, for the purpose of taking the opinion of the Court; but by an abuse of the term, the witness's objection to answer is called a demurrer, in the popular sense; and there must be a way by which the Court can judicially determine its validity. After-

question, see 3 Bl. Com. c. 21: perceiving (as he thinks) an objection, material and valid in point of law, which he may raise against being compelled to give any answer at all to a certain interrogatory he waits before answering it. As to a demurrer to evidence at law, now rarely put in use, see 3 Bl. Com., c. 23.

Objections at the hearing, *vide infra*.]

(*a*) 2 Swanst. 194. [A recent case of a successful demurrer to an interrogatory, Carpmall *v.* Powis, was decided by Lyndhurst, C., 25th March, 1846, on appeal from Langdale, M. R.; and the decision will very probably be reported, above and below.]

(*b*) Lord Eldon says, "The oldest of us recollect no such case in our experience." See also Bowman *v.* Rodwell, 1 Mad. 266; [where a witness before the Examiner objected to certain interrogatories being put to him, on the ground that he was not bound to answer them.]

(*c*) [As, *e. g.*, where an attempt is made to examine husband or wife for or against each other; Langley *v.* Fisher, 5 Beav. 443. And note, this objection is not at all removed by stat. 6 & 7 Vict. c. 85.]

(*d*) [It is for the Court only to judge whether the fact be privileged; see Parkhurst *v.* Lowten, 3 Mad. 124. As to the communications which are so privileged, *vide infra*. And, at law, a witness demurring, (as it were) objecting to produce a document, the Court alone decides, nor will the Judge hear counsel at all on the validity of the objection; Doe *v.* Egremont E. of, 2 Moo. & R. (N. P.) 386.]

(*e*) [See Vaillant *v.* Dodemede, 2 Atk. 524.]

(*f*) [That is the instrument in writing alleging the reasons for his demurrer or tarrying; but, in fact, itself more of the nature of a plea; as it is matter of fact, and requires, if denied, to be supported by proof; *vide infra*.]

(*g*) [As to the practice in the Exchequer, when a witness objected to an interrogatory, see Potts *v.* Curtis, 4 Yo. 304.]

wards he says, "Though we give to this instrument the name of demurrer, it is nothing but the witness's tender of reasons why he should not answer the questions."

The witness must however state his objection, very carefully, (*a*) for these demurrers are held to strict rules, and are readily overruled if they cover too much; (*b*) if, for instance, the witness object to answer on the broad ground of having been professionally employed by the party, instead of saying more definitely that he had been so employed and knows nothing of the matters contained in the interrogatory except from information so obtained. (*c*) Where the witness demurred because he claimed title to land, but did not set forth how, nor under whom, nor swear that he had a title, the demurrer was overruled. (*d*) Yet a demurrer to two separate interrogatories may be allowed as to one only; and it may be allowed as to part of one, if the line can be distinctly drawn. (*e*)

Readily overruled.

These proceedings have a marked difference from demurrers to bills, in that they depend upon extrinsic facts, and are supported and opposed by affidavits. (*f*) The witness, being upon oath, states his reasons for refusing to answer, (*g*) which are taken down and returned as sworn by him, with the interrogatories. There is no particular form, (*h*) either for the [instrument called the] demurrer, or for the affidavits; (*i*) and only one material restriction, viz., that the witness must not state what would have been the effect of his answer if given, for that would allow evidence to transpire before publication has regularly passed. (*k*)

Form.

[62]

(*a*) [And state the objectionable part of the interrogatory; Jackson *v.* Benson, *ut supra.*]

(*b*) [But may be so overruled without costs; Jackson *v.* Benson, *ut supra.* And leave given to put in a written demurrer on examination; Morgan *v.* Shaw, 4 Mad. 54.]

(*c*) Lord Hardwicke, in Vaillant *v.* Dodemede, *ut supra*; and see Jackson *v.* Benson, 1 Y. & J. 32.

(*d*) Herbert *v.* Mayn, 2 Swanst. 198, note; Jefferson *v.* Dawson, 2 Ch. Ca. 208; [and see Jackson *v.* Benson, 1 Y. & C. 36.]

(*e*) Davis *v.* Reid, 5 Sim. 448.

(*f*) Nightingale *v.* Dodd, Mos. 229; Parkhurst *v.* Lowten, 3 Mad. 121. [Kirkwood *v.* Lyons, 1 Hog. 116.]

(*g*) Bowman *v.* Rodwell, 1 Mad. 266. [Langley *v.* Fisher, 5 Beav. 443.]

(*h*) A form of a demurrer on the ground of professional confidence is given pretty fully in Parkhurst *v.* Lowten, 3 Mad. 121, but this was afterwards overruled, 2 Swanst. 204; [see also Morris *v.* Williams, 2 Molloy, 342.]

(*i*) [As to affidavits generally, *vide infra.*]

(*k*) Parkhurst *v.* Lowten, 2 Swanst 213. See Bowman *v.* Rodwell, 1 Mad.

Grounds.

The grounds upon which a witness may demur are very restricted. Such questions as the pertinence of an interrogatory may not be raised by him, because "it does not concern the witness to examine what is the point in issue." (*b*) Yet where the matter inquired into was defamatory to a third person, and apparently immaterial, and altogether disgraceful, [*i. e.* not merely impertinent but scandalous,] a demurrer was allowed. (*c*) The circumstances however must be very peculiar in which this precedent could be followed. (*d*)

Practically speaking, the grounds may be reduced to two heads. The witness may contend that for certain reasons he is incompetent to give the evidence demanded of him; as, that he is a party interested, (*e*) [within the limit of the exceptions in the late act for improving the law of evidence, (*f*) or the husband or wife of such (*g*) [or has acquired his information [solely] from having been professionally employed. (*h*) Or he may stand upon the personal privilege which permits every individual to remain silent when a direct answer might subject him to [pains or] penalties.

[63]

The former grounds invalidate the evidence itself, even if given, and will be treated of in the next Chapter among the rules for the exclusion of evidence. (*i*)

266; and for the practice after the return, Smithson *v.* Hardcastle, Dick. 96. In Bradshaw *v.* Bradshaw, 1 Russ. & M. 358, there was a kind of irregular demurrer.

(*b*) Lord Keeper North, in Ashton *v.* Ashton, 1 Vern. 165, 1 Eq. Ca. Abr. 41. But see Jefferis *v.* Whittuck, 9 Pri. 486.

(*c*) Mulgrave *v.* Lord Dunbar, 2 Swanst. 198, note. [As to scandal or impertinence, *vide supra*, p. 58, n (*e*), *et infra*, P. II. ch. 1, as to suppression of depositions for scandal.]

(*d*) [And it is to be borne in mind, nothing which is pertinent is scandal, however defamatory; Gilb. For. Rom. 207; Dan. Pr. Ch., Headlam's Ed.. 331. As to prolixity, *vide supra*, p. 59, n. (*a*).]

(*e*) Hildersley *v.* Devischer, cited in 2 Atk. 593. [Or the husband or wife, of a person interested, as to such interest; stat. 6 & 7 Vict. c. 85. In bankruptcy, however, it was held, that the objection to a creditor, on the ground of incompetency as a witness to sustain a commission, could not be taken by himself to avoid being examined; *Ex parte* Chamberlain, 19 Ves. 481; S. P. *Re* Godie, 2 Rose, 330.]

(*f*) [Stat. 6 & 7 Vict. c. 85, as to competency, cited fully below.]

(*g*) [See the statute, at length, below.]

(*h*) Parkhurst *v.* Lowten, 2 Swanst. 194, and the cases there cited; [and as to professional communications being privileged, irrespective of reference to any proceedings, see Greenough *v.* Gaskell, 1 M. & K. 1; see also Herring *v.* Clobury, 1 Phil. 91; Jones *v.* Pugh, ibid. 96, and of late, Carpenter *v.* Powis, on appeal, 25th March, 1846.]

(*i*) [Or rather of testimony which,

The latter is a mere personal right, and if the witness himself waive it, his evidence will be unimpeachable. (*a*)

Where answer might subject witness to a criminal charge.

First; It may be claimed wherever an answer might subject the witness to a criminal charge of any kind, or when the answer, however remotely connected with the fact, might have a tendency to prove him guilty. (*b*) The rule was so laid down by Lord Eldon in *Paxton* v. *Douglas*; (*c*) and when the same cause came again before him he said, "In no stage of the proceedings in this Court can a party be compelled to answer any question accusing himself, or any one in a series of questions that has a tendency to that effect: the rule in these cases being that he is at liberty to protect himself against answering not only the direct question whether he did what was illegal, but also every question fairly appearing to be put with the view of drawing from him an answer containing nothing to affect him, except as it is one link in a chain of proof that is to affect him." (*d*)

At *nisi prius* the rule is of constant occurrence, and in the State Trials there are frequent instances. (*e*) The following case shows the great extent to which it has been carried: in an action for a libel in the shape of an extrajudicial affidavit sworn before a magistrate, the magistrate's clerk was held not bound [64]

but for these rules, might be evidence; these rules rendering the persons affected by them incompetent to bear witness. But it should be borne in mind, the objection to husband and wife being examined for or against each other is not merely one arising from interestedness; see Langley *v.* Fisher, 5 Beav. 443; *et vide infra.*]

(*a*) Thus it was held, that the reputed father need not give testimony respecting the parentage of an illegitimate child; yet there was no fault in admitting him to answer, and he might confess the fact; R. *v.* St. Mary's, Nottingham, 13 East, 57, note; [*sed vide infra.*]

(*b*) [This principle, as to answers, is recognised fully in Lea *v.* Read, 5 Beav. 381; and *semble* also that it is a right which, as to a defendant objecting to answer, cannot be waived by any consent; ibid. 385: but, as to a witness, Lord Eldon (after adverting to the old practice) observed, "now it appears to be understood, that he may waive the objection;" Paxton *v.* Douglas, 16 Ves. 242.

But, as to admissions and waivers, *vide supra*, pp. 49 and 50, and notes thereto.]

(*c*) 16 Ves. 242.

(*d*) Paxton *v.* Douglas, 19 Ves. 227-8; see also Green *v.* Weaver, 1 Sim. 430; Honeywood *v.* Selwin, 3 Atk. 276; E. I. Co. *v.* Neave, 5 Ves. 183; Claridge *v.* Hoare, 14 Ves. 65; Whitmore *v.* Francis, 8 Pri. 616; Parkhurst *v.* Lowten, 2 Swanst. 215. But where the discovery sought is not of a fact which can subject the defendant to any penalty, but is connected with some other fact which may, the interrogatories in the bill must be answered; Finch *v.* Finch, 2 Atk. 493; Brownsword *v.* Edwards, 2 Atk. 246, note.

(*e*) See 1 Phill. on Ev. 262, note (2.)

to answer whether by the defendant's orders he wrote it out and delivered it to the magistrate, because copying and shewing a libel is assisting to publish it. (*a*)

Analogy to the rules as to discovery.

A great deal of learning collected by Lord Redesdale on demurrers and pleas to bills of discovery in cases where the situation of the defendant renders it improper for a Court of Equity to compel a discovery, applies equally to the present subject. (*b*) But it would not be reasonable that those rules which arise out of the pleadings, (such as that the defendant must answer if the penalty or forfeiture be waived by the bill,) should affect the witness, who is supposed to know nothing of the pleadings. The Judges of the Exchequer felt this difficulty in *Jackson* v. *Benson*, and they substituted a remedy: they said that the plaintiffs might introduce into their new interrogatories an undertaking to abandon the penalty; and they ordered "That the demurrers should be overruled without costs, and that a new commission should issue for the examination of the witnesses, the plaintiffs undertaking to make no use of the answers for enforcing the penalties." Mr. Baron Hullock observed, "As no objection can be taken to the admissibility in subsequent proceedings, of an answer however irregularly obtained, the only remedy being by application to the Court that the examination may be taken off the file and cancelled, a witness has a right to avail himself of any objection at the time of his examination, or demand that no advantage should be taken thereafter of evidence which might tend to criminate himself." (*c*) Where however other persons than the parties to the suit could enforce the punishment, or sue for the penalties, such an undertaking would be obviously no protection.

Instances.

As instances of the general principle; A woman who had married the widower of her sister, was, even after his death

(*a*) Maloney *v.* Bartley, 3 Campb. 210.

(*b*) Mitf. on Pl. 193, 201, 284, 288. [See also Hare on Disc. 149 and 181; Wigr. on Disc. 2nd Ed., p. 79, *et seq.* As to the validity of certain objections to answer interrogatories with respect to entries in partnership books, see Stuart *v.* Bute Lord, 12 Sim. 460; and as to production of documents, *vide supra*, p. 31, *et seq.*, and, as to the duty of inspection, see Taylor *v.* Blundell, 1 Phill. 222.]

(*c*) 1 Y. & J. 33.

protected from answering inquiries respecting the first marriage, being still liable to ecclesiastical censures. (*a*) While the penal laws against papists were in force a person might refuse to say whether he was a Roman Catholic or not. (*b*) So no answer need be given to a charge of maintenance; (*c*) or of simony; (*d*) or of a conspiracy; (*e*) or of a conversion which amounts to a felony: (*f*) or, in short, of any criminal act. (*g*) Lord Hardwicke intimates that a bankrupt who had been engaged in smuggling transactions (*h*) might demur to answering inquiries relating thereto; and he carries on a parity of reasoning to the case of a clergyman who, by trading, has made himself liable to the penalty in 21 Hen. 8, c. 13, s. 5. (*i*)

[65]

The principle in all these cases holds good when it is a witness, not a party, that requires protection; but instances are rare in the reports, because the fact of guilt becomes almost morally certain from such a refusal to answer, and if the fact exists, the right of protection is indisputable.

Objection no admission.

The Court however professes to consider it by no means an admission of the truth of the fact, that the party or witness demurs to answering. (*j*) Neither will it interpose before the examination and prevent the obnoxious questions from being put. (*k*)

Where answer might charge witness with a debt, or subject him to a civil suit.

Whether the witness was privileged from answering inquiries which might charge him with a debt, or subject him to any civil action, was formerly a mooted point, but the stat. 46 G. 3,

(*a*) Brownsword *v.* Edwards, 2 Ves. 243. [As to the question whether a widower can now lawfully marry the sister of his deceased wife; see (by the way) Tamlyn's Law of Evidence, p. 154, *et seq.*; and stat. 5 & 6 Wm. 4, c. 54, as to all marriages of this kind.]

(*b*) Harrison *v.* Southcote, 1 Atk. 528, 2 Atk. 389; R. *v.* Lord G. Gordon, Doug. 593.

(*c*) Sharp *v.* Carter, 3 P. Wms. 375.

(*d*) London Bp. of *v.* Fytche, 1 B. C. C. 97.

(*e*) Chetwynd *v.* Lindon, 2 Atk. 451.

(*f*) Cartwright *v.* Green, 8 Ves. 405.

(*g*) See Bird *v.* Hardwicke, 1 Vern. 109; E. I. Co. *v.* Campbell, 1 Ves. 246; Claridge *v.* Hoare, 14 Ves. 65; Suffolk E. of *v.* Green, 1 Atk. 450; Fleming *v.* St. John, 2 Sim. 182; Whitmore *v.* Francis, 8 Bri. 616; Att. Gen. *v.* Colman, cited in 5 Ves. 180.

(*h*) [Though bound to discover and answer as to his property, even to the criminating himself, in certain cases; see *Re* Feaks, 2 Dea. & Ch. 226; S. C., M. & B. 215; *Re* Heath, 2 Dea. & Ch. 214; S. C., M. & B. 184; *Re* Smith, 2 Dea. & Ch. 230; S. C., M. & B. 203; and *Re* Heath, 2 Dea. & Ch. 214; S. C., M. & B. 184.]

(*i*) *Ex parte* Meymot, 1 Atk. 200.

(*j*) Lloyd *v.* Pussingham, 16 Ves. 69.

(*k*) *Ex parte* Burlton, 1 G. & J. 30.

c. 37, was passed in order to settle the law on that point, in conformity with the opinion of the majority of the Judges in Lord Melville's case. (*a*) It briefly declares, "That a witness [66] cannot by law refuse to answer a question relative to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of His Majesty, or any other person or persons." (*b*)

It is not likely that the penalty on a bond, or anything in the nature of a penalty, to which the witness may have subjected himself by his own act, would be held to privilege him under this statute; for even when a bye-law of the East India Company had ordered that if a certain act were done, a payment should be made, half to the Company and half to the informer, it was treated as not, strictly speaking, a penalty, but rather a matter of private account; and a servant of the Company who had bound himself to obey their bye-laws, could not avail himself of his liability, as a ground of demurrer to discovery. (*c*)

Where answer might subject witness to a forfeiture.

Secondly; The right of refusing to answer may also be claimed wherever it might subject the witness to a forfeiture of his estate, or to anything in the nature of a forfeiture; and the rules respecting this ground of protection, are very similar to those where the ground of protection is a penalty. Thus to a bill for discovery whether defendant had assigned a lease, whereby under a covenant it would be forfeited, a demurrer was allowed. (*d*) But to an inquiry as to the collateral fact whether the defendant was tenant for life or not, a plea that he had made a lease for the life of another, and consequently if tenant for life would forfeit his estate, was overruled. (*e*)

(*a*) See 1 Phill. on Ev. 263, note; Parliamentary Debates, vol. 6, p. 167.

(*b*) [That a witness must, at law, produce a book in his possession as executor, although he may thereby suffer detriment; see Doe d. Egremont E. of v. Dale, 3 Ad. & E., N. C., 609.]

(*c*) E. I. Co. *v.* Neave, 5 Ves. 173; and see Richards (or Brodrepp) *v.* Cole, Mitf. on Pl. 195.

(*d*) Uxbridge Lord v. Staveland, 1 Ves. 56.

(*e*) Weaver *v.* Meath Earl of, 2 Ves. 108; and see Mitf. on Pl. 197,

That the witness is a *bonâ fide* purchaser without notice, or is in rightful possession by any other means, is a strong reason for his being protected from answering questions which might affect his own title. This has constantly been allowed as a sufficient protection, in the shape of a demurrer or plea to a bill of discovery. (*a*) But where the plaintiff has had the legal estate: or has set up the legal title to the interest claimed, decisions have been conflicting. The cases are collected briefly in the last two pages of Sugden on Vendors; *Burlace* v. *Cooke*, (*b*) *Parker* v. *Blythemore*, (*c*) and *Jerrard* v. *Saunders*, (*d*) are there mentioned as authorities in favour of the plea: *Rogers* v. *Seale*, (*e*) and *Williams* v. *Lambe*, (*f*) against it; and the weight of Sir Edward Sugden's opinion is given in its favour. Lord Eldon allowed the plea in *Gait* v. *Osbaldeston*, (*g*) but in a later case (*h*) Sir John Leach decided against it; so that the question is not at present set at rest.

Purchaser without notice.

[67]

Thirdly; The same right may also be claimed where the question tends to show disgraceful conduct on the part of the witness. But the practice [as to this,] is very arbitrary, and depends always upon the circumstances. Several cases are collected by Mr. Phillipps, and there have been some decisions in Equity which bear upon the question; (*i*) but it is difficult to extract any principle from them. The fact is that one main consideration with the Courts is to maintain decency

Where answer might admit disgraceful conduct, on the part of the witness.

286, and the cases collected there. [The husband charged with procuring his marriage with a minor, by falsely swearing that the consent of her parent had been given, cannot be compelled to discover the facts relating to such charge, upon an information (under the Marriage Act, 4 Geo. 4, c. 76, s. 23,) seeking the forfeiture of his interest in the wife's property, and a settlement of the same on her and her issue; Att. Gen. v. Lucas, 2 Hare, 566. That a person must give testimony, even though it may affect his civil rights, see also *ex parte* Chamberlain, 19 Ves. 482.]

(*a*) Sweet v. Southcote, 2 B. C. C. 66: Aston v. Aston, 3 Atk. 302; Glegg v. Legh, 4 Mad. 193; Mitf. on Pl. 199, 283. Lord Manners seemed to think the legal estate necessary to support the plea; Medlicott v. O'Donel, 1 B. & B. 172, and see Wilker v. Bodington, 2 Vern. 599; Litchfield E. of v. Bond, cited above, p. 25, in note (*d*): [and see Hare on Disc. 89, 91, 94, 242, 259, and as to the point how far by answer to decline to answer, see Order of 26th Aug. 1841, No. 38, Sand. Ord. 885; see also Wigr. on Disc., 2nd ed., 81.]

(*b*) 2 Freem. 24.

(*c*) 2 Eq. Ca. Abr. 79, pl. 1; Pre. in Ch. 58.

(*d*) 2 Ves. 454.

(*e*) 2 Freem. 84.

(*f*) 2 B. C. C. 264.

(*g*) 1 Russ. 158.

(*h*) Collins v. Archer, 1 Russ. & M. 289; and see the note there.

(*i*) In Franco v. Bolton, 3 Ves. 368,

Where answer might defame third persons.

and dignity in their own proceedings, and it has even been known that witnesses were protected from answering, when their disclosures might have injured the reputation of a third person. (*a*)

[68]

Where answer might disclose matters which public policy requires to be kept secret.

Fourthly; It may be claimed by persons connected with the government, or holding certain official situations, with respect to matters which public policy requires to be kept secret, and it must of course be left in a great measure to themselves to decide what questions ought not to be answered. The Court keeps a superintendence and assists the judgment of the witness according to certain general rules. (*b*) One is, that the machinery which is used for the detection of crimes or frauds on the revenue, shall never be exposed;—the agents employed by the police, the names of informers, &c. &c. (*c*) Thus a member of Parliament or any person who has heard the proceedings on a debate, is bound to keep them secret. (*d*) Doubtless the admission of evidence at Lord Strafford's trial respecting advice given to the King in his Privy Council, on which the Lord Chancellor Clarendon comments so strongly in his history, (*e*) could never, in ordinary course of justice, be listened to as a precedent. Even a decision by Lord Kenyon that one of the grand jury might be called to prove who had been the prosecutor of an indictment, (as being a matter which did not infringe on his "grand juryman's oath"), has been seriously questioned. (*f*) An official correspondence of Lord Liverpool, when Secretary of State, though he did not himself raise the objection, was not suffered to be read. (*g*) The report of a

a demurrer was allowed to a bill inquiring whether an agreement to live in concubinage was not the real consideration of a bond. See also King *v.* Burr, 3 Mer. 693.

[This subject is very fully discussed by Mr. Phillipps, in his work alluded to; 9th ed., Vol. I, c. 9, s. 2, p. 417, *et seq.*]

(*a*) Mulgrave *v.* Lord Dunbar, 2 Swanst. 198, note. [*Et vide supra*, p. 54, n. (*a*) *et* n. (*b*). Scandal being the worst species of impertinence; but obviously it is no sufficient ground of objection to pertinent interrogatories as to matter in issue in the cause, merely that the disclosures of witnesses in answering them may injure the reputation of some one.]

(*b*) *Vide supra*, p. 46, and note (*e*).

(*c*) See 1 Phil. on Ev. 271; [and see same work, 9th ed., Vol. I, c. 6, s. 2, p. 177, *et seq.*, the whole subject fully discussed.]

(*d*) Plunkett *v.* Cobbett, 29 Howell's State Trials, 71, 72.

(*e*) Clarendon's Rebellion, Book III.

(*f*) Stypes *v.* Dunbar, Selw. N. P. 1066; and see Watson's case, 24 Howell's State Trials, 107.

(*g*) Anderson *v.* Hamilton, 2 Brod. & Bing. 156, note. [As to waivers of objections, *vide supra*, p. 81, n. (*b*).]

military Court of inquiry respecting the conduct of an officer, was held to be privileged; (*a*) and although it had been said that privileged evidence was to be considered as not in existence, and that secondary evidence might be used, (*b*) yet a copy of the report could not be admitted.

Hearing and costs.

These demurrers are set down for hearing among the regular demurrers: (*c*) and formerly, if they were overruled, the same fixed sum, viz. £5, was paid for costs. (*d*) But an Order of 3rd April 1828, No. 32, which directs—"that upon overruling a demurrer the *defendant* shall pay the taxed costs occasioned thereby unless the Court shall make other order to the contrary," (*e*) has been held to extend to a demurrer to interrogatories. (*f*) Where a witness demurred to two distinct interrogatories, and succeeded as to one, the Vice-Chancellor, (Sir L. Shadwell), allowed him half the costs. (*g*)

[69]

The Court does not willingly interfere with the right of the witness to demur again if he has been beaten upon a point of form. (*h*) In consequence partly of this, partly of the great probability that the claim of exemption from giving evidence is substantially valid, and partly of the difficulty which a witness must always find in drawing up his [demurrer to the] interrogatory quite safely, and the unwillingness which he must naturally feel to contesting a point himself which in most cases could be contested in another form by the party, (*i*) demurrers to interrogatories are proceedings of extremely rare occurrence. (*k*)

(*a*) Home *v.* Bentinck, 2 Brod. & Bing. 130; where the law on this subject is discussed at great length.

(*b*) Cooke *v.* Maxwell, 2 Stark. Rep. 185.

(*c*) Parkhurst *v.* Lowten, 2 Swanst. 198.

(*d*) Parkhurst *v.* Lowten, 2 Swanst. 205; Shepherd *v.* Downing, 2 Swanst. 195, note; Vaillant *v.* Dodemede, 2 Atk. 592; Wardell *v.* Dent, Dick. 334.

(*e*) [Sand. Ord. 719.]

(*f*) Sawyer *v.* Birchmore, reported in the Law Journ. Vol. XIII. p. 249.

(*g*) Davis *v.* Reid, 5 Sim. 443.

(*h*) Parkhurst *v.* Lowten, 2 Swanst. 206; Morgan *v.* Shaw, 4 Mad. 54.

(*i*) [Objecting at the hearing, *vide infra.*]

A witness cannot object to be examined, to establish bankruptcy, on the ground that he is a creditor; *ex parte* Chamberlain, 19 Ves. 481: nor, (even prior to the late statute 6 & 7 Vict. c. 85,) on the ground that being a creditor, and so interested, his testimony would be useless; as although he may think himself to be a creditor, he may not be so; Ibid. 482.

(*k*) [A late case, Carpmael *v.* Powis (cited above), was decided 25th March, 1846, on appeal; but not yet reported: and see Strathmore *v.* Strathmore, 11 Law J. Rep. N. S. Chan. 215.

SECTION III. (*a*)

COMMISSION TO EXAMINE WITNESSES. (*b*)

Country causes.

If the witnesses reside more than twenty miles from London, (*c*) and will not come, or cannot conveniently be brought, to the Examiner's office, it becomes necessary to have a commission to examine them.

[70]

Half that distance was fixed by an Order of 22nd of May, 1661, Lord Clarendon, C., which was, "That no commission *ad examinandum testes*, be executed in London or within ten miles thereof, without special order first obtained upon affidavit made of the party's inability to travel, or other good matter." (*d*) But a practice of many years' standing has established twenty miles as the limit; (*e*) and in point of fact the distance [within the spirit of the "auncient Order" (*f*)] may be said to be continually enlarging itself, as the facilities for travelling increase.

(*a*) [The insertion of the whole of this section, as it stood in the work of Mr. Gresley, may seem to be useless; now that such great alterations have been made, by the orders issued since he finished the work; those especially of May, 1845, *vide post*, p. 94, *et seq.*: but, after consideration, and seeing how great a light is thrown upon these new orders by juxtaposition with the detail of the old practice, particularly that part of it which they were intended to improve, the editor of this edition has determined to leave in the text rather more than is likely to be wanted, in hopes that thereby the whole may be more useful; and he takes this opportunity of expressing his opinion, that recourse must be had occasionally to the oldest orders, by every one who would understand the most modern.

On the subject of this section the Orders of May, 1845, are more numerous than complete. Without any intention to criticise, it is allowable to advert to this fact, they do not wholly supersede the necessity for recurrence to some prior orders: As in Dan. Pr. Ch. by H. 874, is plainly shown.

Besides the ordinary examinations of witnesses, in town or country, by the Examiners or Commissioners, the latter of whom are, for that purpose, equally with the Examiners, officers of the Court, the extraordinary cases of examinations *de bene esse* and those in suits *in perpetuam rei memoriam*, may be made by an Examiner or a commission, as may be most convenient, and we shall therefore advert to these cases separately.

On the subject of examination of witnesses by commission, see also some further details of practice in Mr. Haslam's edition of Dan. Pr. Ch. 872, *et seq.*]

(*b*) [See "an auncient order" in 37 Hen. 8, such only to be granted "for impotency and age or ells by the great distaunce of the way." Sand. Ord. 9. This order deserves perusal, but for brevity sake we omit it here.]

(*c*) [See an order made in Marbury *v.* Smith, 17 Jac. 1, Sand. Ord. 123. This order also is curious: and see the observations of Sir Julius Cæsar, M. R., in an order on this subject; 5 Car. 1. Sand. Ord. 115, and Gilb. For. Rom. 143.]

(*d*) Bea. Ord. p. 193; [Sand. Ord. 304.]

(*e*) See Newland's Ch. Pr. 410, 3rd ed.; Hinde's Ch. Pr. 314, note.

(*f*) *Vide supra*, n. (*b*); indeed the order in Marbury *v.* Smith, see Sand. Ord. 123, expressly mentions twenty miles.]

Lord Nottingham restrained the Examiners to their office in London; but, in former times, they went, or sent their clerks, long distances into the country. (*a*)

[The old practice, prior to the Orders of May, 1845, was thus laid down. (*b*)] Old practice.

The Commission is usually obtained by praying for it in the motion for a *subpœna* to rejoin, upon which the following is added to the common order, "that the plaintiff have a commission for the examination of witnesses returnable without delay; (*c*) and that the defendant's clerk in Court (*d*) do in four days after notice hereof, join and strike commissioners' names with the plaintiff's clerk in Court, and, in default thereof, that the plaintiff have such commission directed to his own commissioners, with liberty to execute the same in Term time." The last words are inserted of course, if desired; even after the peremptory order to speed the cause. The common form omits them; and then the commission can only be executed during the Vacation, if issued from the Court of Chancery, and only up to the second return day, if issued from the Court of Exchequer and begun before the Term. (*e*) If it is not finished before the Term commences, a motion of course is required to continue it; in Chancery, always; in the Exchequer, when it has been made returnable on the last day, or last return day, of the Term. (*f*) Commissions, how obtained.

[71]

When the order is thus drawn, the plaintiff has the carrying of it, and the defendant, if he has an opportunity of examining Carriage of original and additional commissions.

(*a*) Frankland *v.* Frankland, Dick. 231. [As to Examiners, *vide supra*, p. 63, *et seq.*: and we may as well here add, to n. (*d*) at p. 62, that a witness being sick, or in prison, within twenty miles of the metropolis, may be, (and usually is,) examined by the Examiner; see the course of practice, in such cases, in Dan. Ch. Pr. by H. 864: but we must here also add, to prevent misunderstanding, that a commission for the examination of such a witness may be obtained upon motion, to be supported by affidavit: ibid. 872.]

(*b*) [After deliberation, it seems to the editor that this edition will be more likely to be practically useful, with Mr. Gresley's original text and notes, on the subject of the old practice, as to commissioners, &c. corrected and left; and the new orders, regulating the present practice, inserted afterwards, *vide infra*, p. 94, *et seq.*]

(*c*) Or "returnable in eight days after St. Hilary next ensuing," (or any other of the return days), [*ut infra*, p. 91]. If the day is fixed, the Court has, strictly speaking, no power to extend the commission; though it is a common practice to do so when all parties consent; Hall *v.* De Tastet, 6 Mad. 269.

(*d*) [By an Order of Oct. 1842, No. 16, for the respective clerks in Court the solicitors are substituted; Sand. Ord. 920.]

(*e*) See Field *v.* Sowle, 1 Russ. 85.

(*f*) Field *v.* Sowle, 1 Russ. 85, quoting Gilbert and Fowler.

his witnesses, is not entitled to a new commission. (*a*) But if affidavit be made of some reasonable cause of non-attendance, and that neither the party (who did not examine) nor any for him, or by his direction or knowledge, has seen, heard, or been informed of the depositions taken, or any part of them, nor willingly will see, &c. till he has examined, or till publication, the Court will then grant to him also a commission to examine. (*b*) He must however, (according to the order,) "bear all the charge of such renewed commission both in Court and in the country, and as well for the charge and entertainment of his own commissioners as of the commissioners of the other side; and the other side will be permitted to cross-examine the witnesses produced by him that renews the commission: but if the other side examine any other witnesses of his own, then he must bear his own part of the charge." (*c*) The defendant may obtain an order for a new commission and have the carriage of it, if his witnesses reside at a distance of sixty or eighty miles or more from the plaintiff's, (*d*) or if the plaintiff neglect to sue one out. (*e*) And sometimes, when there is reason to suppose that the plaintiff will carry it to an inconvenient place, or will cause vexatious delays, the Court will grant to the defendant a duplicate of the commission, and will appoint a place and time. (*f*) The Court looking to substantial justice, is generally inclined, before publication, to grant commissions on special motions, whenever there is no reason for supposing that the object is delay. (*g*)

Costs of any additional commissions.

Motion for additional commissions.

Notice of the motion.

Two days' notice of a motion for a commission must be served upon the adverse party. But one defendant need not serve it on the other defendants, even in an interpleading cause. (*h*)

[72]

Joining in commission.

The party who has obtained the order gives to the adverse clerk in Court four names of commissioners, (*i*) and calls upon

(*a*) Barnsley *v.* Powell, 3 Atk. 593; Dick. 793; Gilb. For. Rom. 123, 137.

(*b*) [As in Yeart *v.* Barber, 2 Bro. C. C. 1; Dingle *v.* Rouse, Wightw. 99.]

(*c*) [Order of 1661, Clarendon, C., Sand. Ord. 304; Beames, 198; 2 Fowler, 69;] Wyatt's Prac. Reg. 120.

(*d*) Ibid. 123.

(*e*) Barnsley *v.* Powell, 3 Atk. 593; Dick. 793; 1 Newland's Ch. Pr. 257.

(*f*) Gilb. For. Rom. 127, 134.

(*g*) [Further as to new commissions, *vide infra*, p. 96.]

(*h*) Duncannon *v.* Campbell, Dick. 648; Brymer *v.* Buchanan, 1 Cox, 425.

(*i*) They must be persons wholly indifferent and disinterested; as must also be the clerks employed by them; *vide infra*, P. II. ch. 1; and see Wy. Prac. Reg. 121, [the grounds of exception; see also Mostyn, L. *v.* Spencer, 6 Beav. 135].

him to join in commission. If he does not join, he is still at liberty to cross-examine, or to examine his own witnesses, under the commission. But if he joins, he also names four commissioners, and then the clerks in Court (*a*) meet and each strikes out two from the other's list; or if one should neglect, the Court itself will do it on motion. The four remaining are the commissioners. (*b*)

Commissioners how named;

If the defendant choose to join in commission separately, the commissioners may be six, eight, or any indefinite number. There was an old rule in the Exchequer that in such a case the plaintiff is entitled to have two commissioners assigned to him on his part, and the defendants to have one commissioner each on their part. (*c*)

their number.

Their duties are set forth in the Commission which is made out by the clerk in Court (*d*) of the party who has the carriage of it, and in this form.

their duties.

"William the Fourth, by the grace of God, &c. To A. B., "C. D., E. F. and G. H., greeting. Know ye that we in "confidence of your prudence and fidelity, have appointed you, "and by these presents do give unto you, any three or two of "you, (*e*) full power and authority diligently to examine all "witnesses whatsoever upon certain interrogatories to be ex- "hibited to you as well on the part of J. K. complainant, as on "the part of L. M. defendant, or either of them. And there- "fore we command you, any three or two of you, that at certain "days and places to be appointed by you for that purpose, you "do cause the said witnesses to come before you, and then and "there examine each of them apart, upon the said interroga- "tories on their respective corporal oaths first taken before "you, any three or two of you, upon the holy Evangelists, and "that you do take such their examinations, and reduce them "into writing on parchment; and when you shall have so "taken them, you are to send the same to us in our Chancery, "in eight days after St. Hilary next ensuing, (*f*) wheresoever

Form of a commission to examine witnesses.

[73]

(*a*) [Or the solicitors; by a later Order, *ut supra*, p. 89, n. (*c*).]

(*b*) Harrison's Ch. Pr. Ed. of 1808, 244.

(*c*) 2 Fowler, 62.

(*d*) [Or the clerk of records and writs; by a later Order, *ut supra*, p. 89, n. (*c*).]

(*e*) If they are more than four, "any two or more of you."

(*f*) Any one of the regular return days may be fixed, and the commission may continue even up to the evening of the day on which it is returnable. Moreton *v.* Moroton, 1 Dick. 21. If the day is not fixed, but the commission is

"it shall then be, closed up and under your seals, or the seals "of three or two of you, distinctly and plainly set, together "with the said interrogatories and this writ. And we further "command you and every of you, that before you act in, or be "present at the swearing or examining any witness or witnesses "you do severally take the oath first specified in the schedule "hereunto annexed. And we do give you, any three two or "one, of you, full power and authority, jointly or severally, to "administer such oath to the rest, or any other of you, upon "the holy Evangelists. And we further command that all and "every clerk or clerks employed in taking, writing, transcribing, "or engrossing the deposition or depositions of witnesses to be "examined by virtue of these presents, shall before he or they "be permitted to act as clerk or clerks as aforesaid, or be present "at such examination, severally take the oath last specified in "the said schedule annexed. And we also give you or any "one of you full power and authority jointly and severally to "administer such oath to such clerk or clerks upon the holy "Evangelists. Witness ourself at Westminster the day "of in the year of our reign."

"Indorsed by order of Court. J. S."

Oaths of commissioners and clerks.

The forms of the oaths are annexed to the commission, printed, or written on parchment. They were established by an order of Lord Macclesfield's in 1721.(*a*)

[74] C. B. Gilbert had strongly recommended such a rule, in consequence of the great inconvenience that had been felt from the want of it; since, as he says, "the very life and vitals of almost every cause lies in keeping close and secreting the evidence, till after the depositions have been published." (*b*)

returnable, "without delay," it does not expire till the last return day of the following term; Barnesley *v.* Powell, 3 Atk. 593. [If a commission be taken out in Vacation, and has not a certain return, it does not expire on the first day of the following Term, but may be continued in execution the whole of the next Term to the last return; Barnesley *v.* Powell, 3 Atk. 593.] But if the day is fixed, an order cannot be made to extend the time; Hall *v.* De Tastet, 6 Mad. 269.

The Court has not fixed any time within which commissions to be executed in a foreign country are to be returnable; but will inquire whether there has been unreasonable delay; Wake *v.* Franklin, 1 S. & S. 95.

(*a*) Bca. Ord. p. 327, [Sand. Ord. 454].

(*b*) Gilb. For. Rom. 141. So im-

Notice of the execution of a commission.

A written notice of the time and place of executing the commission, must be signed by the two commissioners of the party who had sued it out, and must be sent ten days beforehand in the Easter Vacation, or fourteen in any other Vacation, (*a*) to both the commissioners of every party that has joined. (*b*) A commission cannot be executed in Term time, except with consent, or by leave of the Court, which is granted as of course; (*c*) but if commenced, it need not stop at the beginning of the Term. (*d*)

Carriage of a commission.

As two Commissioners can act, it is one of the advantages of the party who has the carriage of the commission that his commissioners can open it and proceed to business, though the others should neglect to attend.

Occasions for a new commission.

Where one commissioner on each side met, and the plaintiff's commissioner went away without doing anything, and so the commission was lost, the Court ordered the plaintiff to pay the defendant his costs, and that there should be a new commission, and that the defendant should have the carriage of it. (*e*)

Summons to witnesses.

To insure the attendance of witnesses, a summons ought to be sent to each two or three days before the intended execution of the commission. The following is its usual form.

[75]

Form of.

"In Chancery Between { J. K., Plaintiff. / L. M., Defendant.

"Whereas we have received a commission issuing out of, "and under the seal of, the high Court of Chancery, to us and "others therein named directed, for the examination of wit-

portant is secrecy, [deemed to be] that when Lord Hardwicke was willing to have received evidence taken before a Swedish Court, which had interfered with a commission sent into Sweden, he thought that Court's having been an open one, an insuperable objection; Gason *v.* Wordsworth, 2 Ves. 337; and see Cooth *v.* Jackson, 6 Ves. 31.

(*a*) Gilb. For. Rom. 135; Hinde's Ch. Pr. 335; 2 Fowler, 64. [In computing the number of days notice of taking the examination of witnesses, an intervening Sunday is to be reckoned; M'Intosh *v.* Gr. West. Railw. Comp., 1 Hare, 328.]

Where the person whose name and address have been furnished by the adverse party cannot be found, an order may be obtained for a Master to appoint the time and place; Harr. Ch. Pr. 246.

(*c*) [*Vide supra*, p. 89.]

(*d*) Gilb. For. Rom. 135; 2 Fowl. 71. It is however said by Fowler that if the commission be returnable on the second return day, it may be continued during the commencement of the Term, but if on the last return day or later, an order must be obtained for leave to examine in Term time.

(*e*) Wy. Prac. Reg. 123. [For other irregularities, such as will induce the Court to suppress the depositions, *vide infra*, Suppression of Depositions.]

"nesses in a cause in the said Court depending, between J. S., "plaintiff, and J. N., defendant; and whereas we are informed "that you whose names are hereunder written, are material "witnesses for the plaintiff [or defendant] in this cause; these "are, therefore, by virtue of the said commission, to will and "require you, and every of you, severally and personally to be "and appear before us, or any three or two of the said com- "missioners, at the house of, &c., known by the sign of, &c., in, "&c., on the day of next, then and there to be "examined, and to testify your knowledge for and on behalf of "the said plaintiff, [or defendant], and you are then and there "to attend, and not to depart until you have been examined on "the part of the said plaintiff, and herein you are not to fail.

"Given under our hands, &c.:

"To N. M., P. R., S. T., W. E., &c. "A. B. "C. D."

New practice; under the new Orders, of May, 1845.

[Thus stood the old practice, (as to all the steps necessary, from the joining issue to the summons of the witnesses intended to be examined under a commission,) prior to the Orders of May, 1845: these Orders, however, (after altering also the mode of joining issue, by No. 93 of them, referred to above, (*a*),) provide as follows:

Commissions to examine witnesses.

Carriage of commission. Plaintiff.

By No. 95, "Immediately after the replication is filed, the plaintiff, if he thinks fit, may give notice to all other parties entitled to examine witnesses in the cause of his intention to sue out a commission for that purpose; and the plaintiff, if he gives such notice within two days after the filing of the replication, or before any defendant has given notice of his intention to sue out a commission, is to have the carriage of the commission." (*b*)

Defendant.

By No. 96, "After the expiration of two days from the filing of the replication, if the plaintiff has not previously given notice to all other parties entitled to examine witnesses in the

(*a*) [Sand. Ord. 1010-11, *ut supra*, p. 52, n. (*b*), *et vide ibid.* n. (*e*). By this Order, No. 93, of May, 1845,— "upon the filing of such replication the cause is to be deemed to be completely at issue; and each defendant may, without any rule or order, proceed to examine his witnesses so soon as notice of the replication being filed has been duly served on all the defendants who have filed an answer or plea, or against whom a traversing note has been filed."]

(*b*) [Sand. Ord. 1011.]

cause of his intention to sue out a commission for that purpose, any defendant may give notice to all the other parties entitled to examine witnesses in the same cause, of such defendant's intention to sue out a commission for that purpose; and any defendant so giving such notice is to have the carriage of the commission, unless such notice be given by more than one defendant, in which case the defendant who first gave such notice is to have the carriage of the commission." (*a*)

Commissioners two only.

By No. 94, "Commissions to examine witnesses, within the jurisdiction of the Court, are to be directed to two commissioners only; and, unless the Court otherwise orders, are to be made returnable without delay; and the commissioners are to be either barristers or solicitors not concerned in the cause, and each one of such two commissioners is to have all such power or authority to examine witnesses as have heretofore been vested in the acting commissioners named in the commissions to examine witnesses which have heretofore been issued; but the commissioner first named in the commission, to be hereafter issued, is alone to act in the execution of any commission, unless he is by illness, or other sufficient cause, incapacitated from acting therein, in which case the commissioner secondly named is alone to act in the execution of such commission." (*b*)

Commissions to be returnable without delay.

Commissioners qualifications and powers.

One alone to act.

Commission, making out, when parties agree.

By No. 97, "When the parties entitled to examine witnesses in the cause agree to the nomination of persons to be commissioners, and to the order in which such commissioners are to be named, the Record and Writ Clerk, upon being applied to for the purpose, is to cause a commission, directed to such persons, to be sealed and delivered to the person entitled to have the carriage thereof." (*c*)

Record and Writ Clerk's duties.

Time for the parties to agree.

By No. 16, (As to times allowed in procedure), sect. 42, "Parties desiring to examine witnesses by commission are not to apply for a warrant (*d*) to name commissioners to examine witnesses until after the expiration of four days from the filing of the replication." (*e*)

(*a*) [Sand. Ord. 1011-12.]
(*b*) [Sand. Ord. 1011.]
(*c*) [Sand. Ord. 1012.]
(*d*) [The "warrant" presently referred to, in the Order, No. 98; *vide infra*, p. 96.]
(*e*) [Sand. Ord. 993.]

Mode of procedure when the parties do not all agree.

By No. 98, "If all the persons entitled to examine witnesses in the cause have not, within four days after the filing of the replication, (*a*) agreed to the nomination of persons to be commissioners, any party entitled to examine witnesses in the cause may apply to the Master to whom any former reference in the cause has been made, or to the Master in rotation, in case no former reference has been made, for a warrant, returnable in two days, requiring the other parties to attend, for the purpose of having commissioners named, and such Master is to grant such warrant; and the same being duly served, all the persons, on the return thereof, are to propose commissioners; and if among the persons so proposed there are two or more to whom no just objection is made, the Master is to select or nominate and certify to be commissioners such two of the proposed persons as appear to him most proper to perform the duty; but if it appears that no one, or only one of such proposed persons, is free from just objection, the Master, as the case may be, is to nominate and certify two proper persons, or to nominate one proper person, and certify him and the person free from objection to be the commissioners." (*b*)

Application for Master's warrant.

Master's duties.

Questions to be determined by the Master.

By No. 99, "If any question arises as to the commissioner who is to be first named, or as to the party who is to have the carriage of the commission, the Master is to determine such question, and to name the party who is to have the carriage of the commission." (*c*)

Procedure when any additional commission is desired.

By No. 100, "If any party entitled to examine witnesses in a cause shall desire to have any additional commission or commissions, application is to be made to the Master for leave to sue out such additional commission or commissions; and upon the Master's certificate that such additional commission or commissions is, or are proper, to be issued, the same may be sued out in the same manner as a first or only commission; and in case the parties do not agree, any question respecting the commissioners to be named, or the order in which they

(*a*) [The "four days" provided for, by the Order, No. 16; *ut supra*, p. 95.]

(*b*) [Sand. Ord. 1012.]

(*c*) [Sand. Ord. 1012-13. The commissioners being thus appointed by the Court; neither party has any authority to countermand the authority so given; see Sayer *v.* Wagstaff, 5 Beav. 465.]

are to be named in the commission, or any question respecting the carriage of any such additional commission, is to be settled by the Master, as in the case of a first or only commission." (*a*)

Making out a commission where the Master nominates commissioners.

By No. 101, "The Master is to deliver his certificate of the nomination of the commissioners to the solicitor of the party who is to have the carriage of the commission; and such solicitor is, on the same day, or at the latest, on the day next following the date of the Master's certificate, to file the same, and is, within two days from the date thereof, to take an office copy thereof to the record and writ clerk, who is, on the same day, or, at the latest, on the day next following his receipt of such office copy, to seal a commission, directed to the persons named in the certificate, and to deliver such commission to the solicitor from whom he received the certificate; and such solicitor having received the commission is, within one week after the date thereof, to deliver the same to the commissioner therein first named, if he be at the time able to act in the execution of the commission, but if not, then to the commissioner secondly named." (*b*)

Where party having the carriage makes default,

any other may apply.

By No. 102, "If any solicitor (*c*) having the carriage of a commission does not, within six days after the date of the Master's certificate, obtain the commission, and duly deliver the same to the commissioner by whom the same is to be executed, any other party entitled to examine witnesses may apply to the Master for leave to take out a new commission, directed to the same commissioners, and to have the carriage of such commission; and the costs of such application are to be paid by the party in default, whether the application succeeds or not." (*d*)

Form of a commission.

By No. 103, "The form of a commission, to be hereafter issued, for the examination of witnesses, is to be as follows,

(*a*) [Sand. Ord. 1012-13. As to commissions to examine witnesses in parts abroad, *vide infra.*]

(*b*) [Sand. Ord. 1013. Before a person is named as commissioner it should be ascertained that he is able and willing to act; see Hind. Ch. Pr. 360; Dan. Pr. Ch. by H 879.]

(*c*) [*Semble*, here "solicitor" means "such solicitor," or the words, "of a party" are omitted; *sed sic in orig.* Sand. Ord. 1013.]

(*d*) [Sand. Ord. 1013.]

with such (if any) variations as the circumstances of the case require: (*a*)

"VICTORIA, &c.

"To A. B., and C. D., greeting.

Form of a commission to examine witnesses, since 28th Oct. 1845.

"KNOW YE that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give unto each of you full power and authority, diligently to examine all witnesses whatsoever upon certain interrogatories to be exhibited to you in a cause wherein E. P. is complainant, and G. H., and others are defendants; and therefore we command that one of you do, at certain days and places to be appointed for that purpose, cause the said witnesses to come before you, and then and there examine each of them apart upon the said interrogatories, either on their respective corporal oaths first taken before you upon the Holy Evangelists, or in the case of Quakers (*b*) upon their solemn affirmation and declaration, or (*c*) in such other solemn manner as is or may be authorized by law, (*d*) and that you do take such their examination and reduce them into writing on parchment; and when you shall have so taken them you are to send the same to us in our Chancery without delay, wheresoever it shall then be, closed up and under your seal, distinctly and plainly set, together with the said interrogatories and this writ. AND we further command you that before you act in or be present at the swearing or examining any witness or witnesses you do take the oath first specified in the schedule hereunto annexed. AND we further command that all and

(*a*) [The form used prior to the 28th Oct. 1845, *vide supra*, p. 91; and therefore it seems unnecessary in this place to point out each alteration.]

(*b*) [Of other favoured sects, as Moravians, Separatists, &c., *vide supra*, p. 66, *in notis*. And, by the way, it would seem to be inconvenient to appoint a Quaker, or such other person, a commissioner; as he might object to administer the oaths, even to persons who did not object to take them. At law, indeed, when one of the two commissioners, before whom the acknowledgment of a *feme covert* was taken, being a Quaker and a practising attorney, had verified the commissioners' certificate by his affirmation, it was held sufficient; by the Court of Common Pleas, *in re* Scholefield, 3 Bing. N. S. 293, S. C. 3 Sc. 657, and 5 Dowl. 363.]

(*c*) *Semble*, here also is understood some such words as, "in case of any other persons of (to use the vulgar phraseology) any other denominations." And note the oath to be administered to the clerks is expressly directed to be administered "in manner aforesaid." *Vide infra.*]

(*d*) [As to the divers, (so called) solemn manners authorised by law, *vide supra*, pp. 65 and 66, *in notis*.]

every the clerk or clerks employed in taking writing, transcribing, or ingrossing the deposition or depositions of witnesses to be examined by virtue of these presents, shall before he or they be permitted to act as clerk or clerks as aforesaid, or be present at such examination, severally take the oath last specified in the said schedule annexed; AND we also give to you full power and authority to administer such oath to such clerk or clerks in manner aforesaid.

"Witness ourself at Westminster, the day of in the year of our reign.

"LANGDALE." (*a*)

(ENDORSEMENT.)

"By order of Court,"

"(Name and address of agent and solicitor issuing writ)." (*b*)

Form of the oath of a commissioner.

By No. 104, "The oath to be taken by a commissioner is to be set forth in a schedule annexed to the commission, and is to be in the form following; viz.

"You shall according to the best of your skill and knowledge "truly, faithfully and without partiality to any or either of the "parties in this cause, take the examinations and depositions "of all and every witness and witnesses produced and examined, "by virtue of the commission hereunto annexed, upon the "interrogatories (*c*) produced and left with you; and you shall "not publish, disclose, or make known to any person or persons "whatsoever, except to the clerk or clerks by you employed, "and sworn to secrecy, in the execution of this commission, the "contents of all or any of the depositions, of the witnesses or "any of them, to be taken by you (*d*) by virtue of the said com-"mission, until publication shall pass, pursuant to some general "or special order of the High Court of Chancery.

"So help you GOD."

(*a*) [The Master of the Rolls.]

(*b*) [Sand. Ord. 1013-14.]

(*c*) [It does not appear to follow, that because the word "now" is omitted, out of the form of the oath, (which see in Sand. Ord. 455), the words "to be" are understood; see Dan. Pr. Ch., by H., 859: but see the present form of the commission in the last page.]

(*d*) [The form used to be "and the other commissioners in the said commission named or any of them;" see Sand. Ord. 455.]

When oath to be taken, and before whom.

And the said oath is to be taken by the commissioner who is to act in the execution of the commission, previously to his acting therein; before any Master in ordinary, or before any Master extraordinary of the Court who is not employed, or concerned, in the cause; and such Master extraordinary is hereby authorized and required to administer such oath." (*a*)

Form of the oath of a clerk of a commissioner.

By No. 105, "The oath to be taken by the clerk or clerks employed in taking, writing, transcribing, or engrossing the deposition or depositions of witnesses, to be examined by virtue of a commission, is to be set forth in a schedule annexed to the commission, and is to be in the form following; viz.

"You shall truly and faithfully, and without partiality to any "or either of the parties in this cause, take and write down, "transcribe and engross, the depositions of all and every "witness and witnesses produced before and examined by either "of the commissioners named in the commission hereunto an- "nexed as far forth as you are directed and employed by the said "commissioners to take, write down, or engross the said depo- "sitions, or any of them; and you shall not publish, disclose, "or make known, to any person or persons whatsoever, the con- "tents of all or any of the depositions of the witnesses, or any "of them, to be taken, written down, transcribed, or ingrossed "by you, or whereto you shall have recourse or be any ways "privy, until publication shall pass, pursuant to some general "or special order of the high Court of Chancery.

"So help you God."

When oath to be taken, and before whom.

And the said oath is to be taken, before the acting commissioner, by the clerk or clerks employed, as aforesaid, before he or they be permitted to act as such clerk or clerks, or to be present at the examination of witnesses under the commission; and the commissioner is hereby authorized and required to administer the said oath to such clerk or clerks, accordingly." (*b*)

Notice of the

By No. 106, "The commissioner having taken such oath is,

(*a*) [Sand. Ord. 1014-15. This Order omits to express, that the oath may be taken "in manner aforesaid," as is provided with regard to the oaths of the clerks, by the very words of the commission, *vide supra*, p. 99.

As to an oath or its equivalent substitute in certain cases, *vide supra*, p. 98, *in notis* (*b*), (*c*), *et* (*d*).

(*b*) [Sand. Ord. 1015; and see last note.]

at the instance of any party entitled to examine witnesses, to sign and deliver to such party a notice in writing, specifying the time and place when and where he will proceed to examine witnesses; and such notice is to be duly served, by the party who obtains it, upon the solicitors of all the other parties entitled to examine witnesses under the commission, and in case any such party has no solicitor, upon such party, at least ten clear days before the day therein named for proceeding to examine witnesses."] (*a*)

time and place of examination of the witnesses.

Service of such notice.

[In general the attendance of a witness is secured, by a mere formal summons from the commissioners. (*b*)]

Attendance of a witness.

Summons.

But if a witness should refuse to appear, or if it should be suspected beforehand that he will refuse [or neglect] to appear, it becomes necessary to send him a *subpœnâ ad testificandum* or a *subpœnâ duces tecum*, (*c*) whichever is required. (*d*) This must be served upon him personally, together with the commissioners' summons, and one shilling for conduct money, or his reasonable expenses where he does not reside close at hand. (*e*) If a witness thus served with summons and *subpœnâ*, neglects or refuses to appear, or appearing refuses to give evidence properly, or to assign a sufficient reason for withholding his testimony, a certificate of such neglect or refusal must be given by the acting commissioners, and an affidavit made and filed of the service of the *subpœnâ* and the commis-

Subpœnâ ad testificandum, or *duces tecum*.

Service.

[76]

Expenses.

Witness unwilling.

(*a*) [Sand. Ord. 1015.
The Order, No. 94, (*ut supra*, p. 95,) sufficiently points out that no counsel or solicitor concerned in the cause should act as a commissioner; and such was the rule before, see Fricker *v.* Moore, Bunb. 289; Selwyn's case, 2 Dick. 563; and see Cooke *v.* Wilson, 4 Mad. 380; and Gordon *v.* Gordon, 1 Swanst. 166. And (by the way) one appointed a commissioner must not act as solicitor for a party who has to examine witnesses under it; *per* Lord Langdale, M. R., in Sayer *v.* Wagstaff, 5 Beav. 464; see also Mostyn Lord, *v.* Spencer, 6 Beav. 135; and further as to many other equally objectionable proceedings, *vide infra*, Suppression of Depositions.]

(*b*) [Hind Ch. Pr. 336, *et seq.*, where the form of one is given; see also Dan. Pr. Ch., by H., p. 883, *et seq.*]

(*c*) Wardel *v.* Dent, Dick. 334. [The reason for this necessity being, that no process of contempt would lie upon a disobedience of this summons, no writ under seal having been directed to the witness; Hind. Pr. Ch. 337; and see Dan. Pr. Ch., by H., p. 884, n. (*k*).]

(*d*) [*Ut supra*, p. 64, as to *subpœnâ ad testificandum*, and *duces tecum*, *vide supra*, p. 64, n. (*a*), and cases there cited.]

(*e*) [See Dan. Pr. Ch., by H., 884-5. As to the remuneration allowed at law, for the time of a witness, required to depose to his opinion, on a matter of skill, see Webb *v.* Page, 1 Car. & K. 23: distinguishing such a witness from one required to depose as to facts merely.]

Process to compel such an one to appear, produce documents, and testify.

sioners' summons. (*a*) The Court will on motion, supported by this certificate and affidavit, order him peremptorily to do the act required, (*b*) and on his still refusing commit him for contempt, or will sometimes compel him to appear and be examined in Court at his own costs. (*c*)

Interrogatories when given to the commissioners.

The interrogatories were anciently annexed to the commission; (*d*) and so, C. B. Gilbert says, (*e*) they are now supposed to be, but by consent of parties, they are delivered to the commissioners at the opening of the commission. It was the practice when Lord Eldon was at the Bar for all to be so delivered.

Custom to file new interrogatories.

But it became afterwards, and still continues, customary, to file new interrogatories and "feed the commissioners with them from time to time as the witnesses can be presented either for original or cross-examination until the supply of witnesses is

[77]

exhausted." (*f*) This has been carried to the extent of allowing cross-interrogatories to be filed and added to those already exhibited, even after the examination in chief had been closed. (*g*)

[The proceedings, as under the old system, are thus detailed:]

Opening the commission, &c.

The commissioners proceed to business by opening the com-

(*a*) Harr. Ch. Pr. 269. The commissioners' certificate need not be sworn, because they are *pro tempore* officers of the Court.

(*b*) The [practice of the] Court of Exchequer [was to] make an order upon the witness to show cause why he should not stand committed for contempt; 2 Fowler, 106.

(*c*) Wyatt's Prac. Reg. 124; [and see Dan. Pr. Ch., by H., 885.

It is not essential to the maintaining of an action at law against a witness, for not attending, that he should be called on his *subpœnâ*; if in fact he was, at the time, in such a place that he could not possibly obey the *subpœnâ*, that is a sufficient breach of duty whereupon to ground the action; Lamont *v.* Crook, 8 Mees. & W. 615, and S. C. 8 Dowl. 737; and see Mullet *v.* Hunt, 1 Cr. & Mees. 752.]

(*d*) Gilb. For. Rom. 126.

(*e*) [By an Order of Jan. 1618-19, Bacon, C., No. 68, "All commissions for examination of witnesses shall be *super interrogatoriis inclusis* only; and no return of depositions into the Court shall be received but such only as shall be either comprised in one roll, subscribed with the name of the commissioners or else in divers rolls, whereof each one shall be so subscribed." Sand. Ord. 118; and to like effect was an Order of 1596; ibid. 70.]

(*f*) Campbell *v.* Scougal, 19 Ves. 555; Lord Eldon continues, "That was not the case formerly: I have frequently when at the Bar, drawn interrogatories guessing at what any witness, to be examined to any fact in any issue, could possibly represent; and the interrogatories both for the cross-examination, and for the original examination of the defendant's witnesses, were prepared before the commission was opened." [And yet see Dan. Pr. Ch. by H. 859. And as to the present practice, *vide supra*, p. 69, 70, n. (*a*), *et* p. 99, n. (*c*). As to the drawing of interrogatories, *vide supra*, p. 54, *et seq.*]

(*g*) Carter *v.* Draper, 2 Sim. 53. [So only that the time for publication have not passed; *et vide infra.*]

mission and reading it, and then administering the oaths to each other and to their clerks. (*a*) They then sign their names at the bottom of both sets of interrogatories, and one of them, or a clerk, draws up the style or title of the depositions on paper (*b*) in this form. (*c*)

Title and form of the depositions.

"Depositions of witnesses produced, sworn, and examined "on the day of in the year of , and in the "year of our Lord , at the house of known by the "sign of in the of in the county of , "by virtue of a commission issuing out of the High Court of "Chancery, to us A. B., and C. D., directed for the examina- "tion of witnesses in a cause depending and at issue between "J. K. complainant, and L. M. defendant; we, the acting "commissioners under the said commission, and also the respec- "tive clerks by us employed in taking, writing, transcribing, "and engrossing the said depositions, having first severally "taken the oaths annexed to the said commission, according to "the tenor and effect thereof, and as thereby directed on the "part and behalf of the complainant J. K. (*d*)

[After each witness has been introduced, and duly sworn, in the manner we shall presently advert to, the answers given by him, to the interrogatories upon which he is examined, are prefaced by a note of the particulars of his name, &c., written under the title of the deposition, thus:]

Heading of the depositions of each witness.

"N. M. of aged years, or thereabouts, a witness "produced, sworn, and examined on the part and behalf of the "complainant J. K., deposeth and saith as follows:

[And then the form of depositions after each such heading runs thus:]

"To the first interrogatory deponent saith, &c." (*e*)

(*a*) [The acting commissioner has now full powers to act alone; see Order, No. 94, *supra*, p. 95; and as to the oaths, *vide supra*, pp. 99 and 100.]

(*b*) Harr. Ch. Pr. 266. [These are the paper drafts alluded to below.]

(*c*) [This form, see also in Hind. Pr. Ch. 345, cited in Dan. Pr. Ch. by H. 888; but it is obvious, that it will require a slight alteration to suit the case of a commissioner acting singly.]

(*d*) [Or of the defendant L. M., as may be, under the Orders of May, 1845. Every commission is for the benefit of all parties entitled to examine witnesses in the cause; and the commissioner has full power, to examine and cross-examine, on behalf of all of them; Dan. Ch. Pr. by H. 883.]

(*e*) Or, where it is necessary, [by an Order of May, 1661, Clarendon, C.,] "To such an interrogatory this exa-

Witness introduced.

[78]

All persons except the commissioners and their clerks having left the room, (*a*) [a person proposed as] a witness on the side of the party who has sued out the commission, is introduced, with a note from the solicitor [of that party] containing his name, rank or occupation, age, and place of abode, and mentioning the several interrogatories to which he is to be examined. (*b*) [The commissioner producing the interrogatories, takes them in his hand, and reads the title of them to the person intended to be examined as a witness.] The following oath is then put to him:

Form of the oath of a witness.

"You shall true answer make to all such questions as shall "be asked of you on these interrogatories, without favour or "affection to either party, and therein you shall speak the truth "the whole truth, and nothing but the truth. So help you "God." (*c*)

Examination of a witness.

One of the commissioners for the party producing the witness, [or, under the Orders of May, 1845, the sole acting commissioner] must examine him, reading one interrogatory at a time, and not allowing him to see the others till he has given a proper answer to it. (*d*) He proceeds in short, very much as has been described in the case of the Examiner, (*e*) exercising an ill defined control over the answers; not being compelled to take an absurd or irrelevant answer, but not being permitted to use much discretion in the matter. (*f*) There is, however, a

[79]

minant cannot depose;" Bea. Ord. 190; [Sand. Ord. 303. But, by an Order of May, 1845, No. 107, "All depositions of witnesses are to be taken and expressed in the first person of the deponent;" Sand. Ord. 1016. It was already the case as to those taken before the Examiner; by stat. 3 & 4 Wm. 4, c. 94, s. 27, *et vide* 8 Sim. 380.]

(*a*) Even a person who had been named as a commissioner, but refused to qualify, was properly excluded; Shaw *v.* Lindesay, 1 Ves. 384, [*et vide supra*, p. 67, n. (*e*). And also as to what means the witness may resort to in order to refresh his memory; Ibid; *et supra*, p. 73, n. (*b*).]

(*b*) Harr. Ch. Pr. 266; Bea. Ord. 184; [and see Dan. Pr. Ch., by H., 889. Also, as to what in the civil law Courts is styled a "designation of the witnesses," *i. e.*, a minute of the evidence expected, and the utter inadmissibility and impropriety of such a document; *vide supra*, p. 67, n. (*c*).]

(*c*) [The oath is repeated for each set of fresh interrogatories, *vide infra*. As to oaths, &c., *vide supra*, p. 65, n. (*f*).

Under a commission to examine witnesses, foreigners, who cannot understand and speak English, the depositions must nevertheless be taken down in English, by means of a sworn interpreter; see Belmore Lord, *v.* Anderson, 2 Cox, 288, and S. C. 4 Bro. C. C. 90; *ut supra*, p. 68, n. (*c*).]

(*d*) Harr. Ch. Pr. 267.

(*e*) [*Ut supra*, p. 66, *et seq.*; *ut vide* Sand. Ord. 302.]

(*f*) See Whitelock *v.* Baker, 13 Ves. 515; 2 P. Wms. 406; [*ut supra*, p. 76.]

material difference in one respect, namely, that they are in some degree partisans. (*a*) An instance will explain that this difference is essential. A witness not fully comprehending the question, may very possibly say something which is not a direct answer, but which contains a piece of evidence of importance to one of the parties. The Examiner would simply explain the question and get a proper answer, but [formerly] the commissioners on one side would eagerly write down the inadvertent words of the witness, while those on the other side would probably object to receiving them; they would thereupon be written on a separate piece of parchment and attached to the examination with a certificate of the circumstances, and the Court would decide whether they were to be received or not. In the great cause of *Small* v. *Attwood*, an important piece of evidence was obtained in this manner.

Inconveniences attendant upon the old practice.

The Practical Register says, "After they have been examined they may be suffered, on better thoughts, to amend their examination," which is not to be suffered on an examination in Court. (*b*) This would of course be likely to be allowed less strictly by the Examiner than by the commissioners. (*c*) A witness in support of a petition, (after publication,) to amend his deposition, swore positively that he never meant to assert what had been taken down; it was allowed to be altered. (*d*) Lord Eldon refused to allow a witness to be

Amending depositions.

(*a*) [Under the old system; yet so far only as having under their care the interests of the party employing them;] Campbell *v.* Scougal, 19 Ves. 553; in Atkins *v.* Palmer, 4 B. & A. 381, Mr. Justice Bayley seems to consider the commissioner as in some degree in the nature of an agent for the party who chose him, having a power of sanctioning an irregularity. *Sed qu.* See Cooth *v* Jackson, 6 Ves. 31. [But now the very semblance of partizanship is precluded; *vide supra*, p. 102, n. (*a*).] A commissioner can maintain an action for his fees against the party for whom he acts; Stockhold *v* Collington, 1 Salk. 230. [But (by the way) the Court will restrain commissioners for taking examinations, from bringing actions for their fees, and refer it to the Master to ascertain what is due; Blundell *v.* Gladstone, 9 Sim. 455.]

(*b*) Wyatt's Prac. Reg. 124.

(*c*) [*Vide supra*, p. 68, *et seq.*, as to the course before an Examiner.]

(*d*) Griells *v.* Gansell, 2 P. Wms. 646; [and so in Penderel *v.* Penderel, Kel. 25; but *contrà* in Traherne *v.* Burdus, ibid. 26, and Ingram *v.* Mitchell, 5 Ves. 297;] and see Randall *v.* Richford, 1 Ch. Ca. 25, which was not referred to in Griells *v.* Gansell. [Where a witness alleged he had made a mistake, the commission having been returned, he came to London and made oath that he had been surprised; a special commission issued to re-examine the witnesses, which was done accordingly. But, upon motion, this commission was superseded, by advice of the Master of the Rolls with the six clerks, as contrary to the course of the Court; S. C. Dick. 277.]

Re-examination.

[80]

re-examined, even before publication; the application being to explain his evidence, and the affidavit being that he had omitted a material circumstance. (*a*) Several cases bearing on this point are collected in Sir L. Shadwell's judgment in *Hood* v. *Pymm*; (*b*) and the subject will be mentioned again when we speak of re-examination. (*c*)

Signing drafts of depositions.

The depositions, when finished, must be carefully read over to the witness, and if he should find that he has asserted anything by mistake which he cannot swear to, it must be rectified; (at least he may add an explanation or qualification;) which done, the witness must sign his name, or mark, to his depositions. (*d*) He may then be cross-examined, (*e*) or be examined in chief by [or on behalf of] other parties; a repetition of his oath being necessary for each new set of interrogatories. (*f*)

Cross-examination.

Quantity to be performed daily.

The average quantity of depositions which commissioners are expected to get through in a day, may be taken at about

(*a*) Lord Abergavenny *v.* Powell, 1 Mer. 130. [But, even after publication, the deposition of a witness was allowed to be amended, when there appeared clearly a mistake made by him in a material part of his evidence; Rowley *v.* Ridley, 1 Cox, 281; S. C., Dick. 277; and see Kirk *v.* Kirk, 13 Ves. 280. Deposition of witness rectified, he having been first examined by Examiner before the Court, see Darling *v.* Staniforth, Dick. 358, and see Byrne *v.* Frere, 1 Moll. 396. But a motion for liberty for a witness to rectify his depositions after publication, the point not appearing to be a mere mistake, and his affidavit not explaining it satisfactorily, was refused, with costs, in Kenny *v.* Dalton, 2 Moll. 386.]

(*b*) 4 Sim. 110.

(*c*) *Infra*, P. I. ch. 4, [and see Peacock *v.* Collens, Cary, 47, and Anon., Toth. An answer of a witness being insufficient, he was again examined, in High *v.* Montford, Cary, 82.]

(*d*) Hinde's Ch. Pr. 349; Harr. Ch. Pr. 267; [Dan. Pr. Ch. by H. pp. 890-1. Unless signed by the witness the depositions cannot be used as evidence; *vide supra*, p. 69, n. (*a*).]

(*e*) [As to cross-examination generally, *vide supra*, p. 61. As to cross-examination with regard to the execution of deeds, *vide* Turner *v.* Burleigh, 17 Ves. 354, *supra*, p. 71, n. (*a*). As to the duty of producing the witness to be cross-examined, see Whittuck *v.* Lysaught, 1 Sim. & S. 446, *supra*, p. 71, n. (*b*).

A party who omits to cross-examine a witness, under a commission, at the usual period, will be allowed to exhibit interrogatories for that purpose on a subsequent day; Carter *v.* Draper, 2 Sim. 52. A new commission to cross-examine, upon a special case, in Hanover K. of, *v.* Wheatley, 4 Beav. 78; and S. P. Campbell *v.* Scougall, 19 Ves. 552.]

(*f*) Hind. Ch. Pr. 349; Harr. Ch. Pr. 207. [Pending an examination in Court (*i. e.* before the Examiner) new interrogatories may be exhibited from time to time, (*vide supra*, p. 70, n. (*a*),) but not on an examination before commissioners, without leave of the Court first obtained; Hanover K. of, *v.* Wheatley, 4 Beav. 78; see Cowslade *v.* Cornish, 2 Ves. 270; and see an Order of 13 Car. 1, 1637, made in Lewes *v.* Owen, Sand. Ord. 201. See also Haywood *v.* Colley, Dick. 43. Witnesses may be examined again as to new matters; Turner *v.* Trelawney, 9 Sim. 453. And as to the practice in Ireland, see O'Keefe's Ord. 115.]

thirty folios. That quantity is reckoned a fair day's work in the Master's Office, in the taxation of costs; and Lord Lyndhurst (when C. B.) sanctioned the practice. In *Small* v. *Attwood*, the Master had allowed fees for 199 days. It was stated, that usually the receipt of the commissioners mentioning the number of days and the claim for fees and for travelling expenses, is produced before the Master, but it had been omitted, and he had resorted to the above principle. The defendants insisted that the time occupied had been far less, but Lord Lyndhurst held that they might have insisted upon the number of days being inserted in the receipt of the commissioners, but having lost that opportunity, they must submit to the Master's mode of computation. (*a*)

Examining a commissioner or a clerk.

One commissioner may be examined as a witness by the other commissioners; but it must take place before any witness has been examined in his presence. (*b*) So also may a clerk.

Proof of all documents.

Books, deeds, and papers, are often proved under the commission, and are made exhibits in the cause. (*c*) The witness should be desired to bring them, in the summons, or, if necessary, he should be served with a *subpœna duces tecum*. (*d*). On each document so proved the following endorsement is written:

[81]

"In Chancery. Between { J. K., Plaintiff. / L. M., Defendant.

Endorsement on each.

(Date) "At the execution of a commission for the examina- "tion of witnesses in this cause, this paper [or parchment] "writing was produced and shown to N. M., a witness sworn

(*a*) Exch. 20 Nov. 1834. MS. [As to the payments to the commissioner, under the Orders of May, 1845, *vide* Order, No. 110; Sand. Ord. 1016, *et infra*, p. 109.]

(*b*) Wyatt's Prac. Reg. 125; [Bright v. Woodward, 1 Vern. 392, and Maude v. Hartley, 2 Fowl. 99. Under special circumstances the Court of Exchequer would permit a commissioner to be examined, even after the commission had been opened, and the examination of witnesses proceeded with; Grubb v. Grubb, 1 Yo. & J. 36.]

(*c*) [Documents how proved, *vide infra*, Exhibits. And how such are called to the notice of the solicitor by counsel; see, *e. g.*, Van Heyth. Eq. Draftsman, p. 496.]

(*d*) Hinde's Ch. Pr. 349; Harr. Ch. Pr. 270. [For the form of such a *subpœnâ*, *vide supra*, p. 64, n. (*a*), and notice to produce to be added to the summons, mentioned above and at p. 101, will be in the same form as the *duces tecum* clause in the *subpœnâ*; Dan. Pr. Ch. by H. 884.]

"and examined, and by him deposed unto at the time of his "examination on the complainant's [or defendant's] behalf; "(And [if other witnesses depose to it, add,] was also pro- "duced and shown unto P. R., &c.) before us. (*a*)

"A. B.

"C. D."

Certificate of commissioners.

If anything occurs of which it is necessary to inform the Court, it must be certified by the commissioners in the return of the commission; without affidavit, because, being officers of the Court, they are allowed to certify. But it would seem that the party wishing to avail himself of such certificate must make an application; supported by an affidavit of the fact, otherwise the Court will not take notice of the commissioners' certificate alone, because they are appointed for another purpose, and are not to certify but of necessity. (*b*) Thus if any of the commissioners obstruct the others in their examination, or examine irregularly, such misbehaviour ought to be certified to the Court. (*c*) [Thus if a witness, after due service of a *subpœna*, fails to appear, or appearing fails to submit properly to examination, or fails to bring and produce a document in his possession sufficiently defined in the *duces tecum clause* of the *subpœna*, and shows no sufficient excuse for such defaults (*d*).] Thus also if a witness should demur to the interrogatories, a certificate as well as the demurrer ought to be returned with the commission. (*e*) Thus too if witnesses

Misbehaviour of one of the commissioners,

or of a witness.

Demurrer of a witness.

Oaths, &c.

(*a*) [As only one commissioner may act, the "us" will become "me," and C. D. will be omitted.]

(*b*) Hinde's Ch. Pr. 358.

(*c*) Ibid. [That commissioners are to be examined, on occasions of partiality or other malpractice alleged, see Morgan *v.* Bowdler, Toth. 40, *et* ibid. 189; S. P. Anon. Carey, 53; —— *v.* Fortescue, Hard. 170. In a case where a commissioner had misbehaved himself, and the others certified, see the course taken by the Court. Anon. Prac. Reg. 126. And where commissioners refused to examine a witness (merely because he was illiterate) on affidavit of the fact, they were attached, and the witness ordered to be examined by the Examiner; How. Pr. Ex. Ireland, 593, and see Reilly *v.* Reilly, ibid. When affidavits are required, see Anon. Prac. Alm. Cur. Canc. 19.]

(*d*) [As to the proper course to enforce obedience to the *subpœna*, see Dan. Pr. Ch., by H., 885, and Bradshaw *v.* Bradshaw, 1 Russ. & M. 358.]

(*e*) [As to demurrer (so called) of a witness, *vide supra*, p. 77. Where on the execution of a commission a witness is served with a *subpœnâ duces tecum*, it is not necessary to have an interrogatory, as to the fact of his having the deeds, &c. in his possession; Bradshaw *v.* Bradshaw, 1 Russ. & M. 358. A refusal on his part to produce them is at the risk of costs, in the event of his failing to satisfy the Court of his right so to refuse; ibid. As to grounds of such refusal, *vide supra*, p. 39, *et seq.*; p. 64, n. (*a*), and p. 80, *et seq.*]

of another religion are sworn by peculiar rites; (*a*) and in a great variety of other matters. (*b*)

Proceedings under a commission *de die in diem.*

[By another of the Orders of May, 1845, No. 108.] "If the examination of witnesses cannot be completed in one day, and the circumstances of the case permit, the commissioner is to proceed, *de die in diem*, during six hours of each day, between the hours of eight in the morning and six in the afternoon, until the witnesses for all parties are fully examined; nevertheless the commissioner may, if in his opinion the circumstances of the case require an adjournment, adjourn the proceedings, from time to time and from place to place, in such manner as he thinks proper; but he is in all cases to enter on the depositions any adjournment, and where such adjournment is from place to place, or otherwise than *de die in diem*, the cause or reason of such adjournment; and he is also to enter on the depositions the hours of the day on which he commences and concludes the examination of witnesses on each day, and the true cause of his not proceeding for the full time of six hours on each day, if such should be the case." (*c*)

Adjournments.

Entries on the depositions.

[And, as to commissioners, under the old system prior to October, 1845.]

When the commissioners intend to meet again, they must go through the form of an adjournment, (*d*) or their commission, if it has once been opened, expires; for it is granted only for certain days. (*e*) It is usual to make a memorandum of the adjournment, signed by the commissioners; and the time and place should always be carefully noted down, to be ready in case there should be an indictment for perjury. (*f*)

Adjournment.

[82]

The depositions when finished are engrossed on skins of

Depositions

(*a*) Omychund *v.* Barker, 1 Atk. 21, [*ut vide supra*, p. 66, in notes.]

(*b*) [Commissioners making a false return, as, *e. g.*, that a witness was examined upon oath, who was not, are finable; Dan. Pr. Ch., by H., p. 892, citing Hind. 358; Cro. Eliz. 623.]

(*c*) [Sand. Ord. 1016.]

(*d*) [Under the old rules a special commission was granted to examine witnesses; the six clerks appointed time and place; *per cur.* the time and place are only for the first meeting of the commissioners; but after, they may adjourn to another time or another place; Thornborough *v.* Baker, 1 Ch. Ca. 283, S. P. Brown *v.* Vermuden, 1 Ch. Ca. 282, and now, for the form of the commission, *vide supra*, p. 98.]

(*e*) Gilb. For. Rom. 129. [Old form of commission, *vide supra*, p. 91.]

(*f*) Wy. Prac. Reg. 125.

engrossed signed by witnesses and by commissioners.

parchment (*a*) by the clerks who have been sworn to secrecy, (*b*) each witness again subscribing his name to his own deposition when engrossed; (*c*) and the commissioners also subscribe their names to each skin. (*d*)

The return is then endorsed in this form,

Endorsement.

"The execution of this commission appears in a certain "schedule" (or schedules if more than one skin) "hereunto "annexed.

"A. B.
"C. D."

New practice as to sealing up and transmission of depositions, &c.

[By another of the Orders of May 1845, No. 109. "When the examination of witnesses is completed, the commissioner is to seal up the depositions, and is to transmit the same, sealed up with the commission to the record and writ clerk's office." (*e*)]

Old practice as to return of commission.

[But according to the old system however,] the commission with the depositions on the parchment, and the interrogatories, and the certificates, if any, must be folded up so that no part of the writing can be seen, and tied up with tape or string, at the crossings of which the commissioners must set their seals and sign their names.

The parcel must then be delivered to the clerk in Court who made out the commission, or to his agent at the Six Clerks' Office, (*f*) either by one of the commissioners, or by some one who has been entrusted with it; in which latter case the messenger is immediately taken to the public office, and there

(*a*) When depositions were returned on paper, the Court allowed them to be engrossed on parchment, and the engrossment to be filed; Willis *v.* Gabbut, 2 Y. & J. 326. [But by the very words of the new form of commission, *vide supra*, p. 98, as of the old form, *vide supra*, p. 91, they should be engrossed on parchment.] And before the stamp duty was repealed, depositions which had been taken in India where no proper stamps could be procured, were ordered to be properly engrossed and stamped; Chitty *v.* E. I. Co., 2 Cox, 190.

(*b*) [*Vide supra*, p. 100.]

(*c*) [*Vide supra*, p. 106, *et* ibid. n. (*d*); and Brydges *v.* Bramfill, 12 Sim. 324.]

(*d*) Bea. Ord. p. 30. [See an Order of 1618-19, No. 68, *supra* p. 102, n. (*e*), Sand. Ord. 118.

(*e*) [Sand. Ord. 1016.]

(*f*) [The Six Clerks' Office being abolished by an Order of Oct. 1842, under stat. 5 & 6 Vict. c. 103, by No. 2, of those Orders, the clerks of records and writs perform their duties; Sand. Ord. 916; by No. 7, oaths (or affirmations) as to the carriage of examinations or depositions of witnesses, taken before commissioners in the country, may be sworn, &c., before any clerk of records and writs, or before the clerk of enrolment in Chancery, as occasion may require, for the better dispatch of business; Sand. Ord. 917. As to commission in Exchequer when returned, see Irving *v.* Viana, 1 Y. & J. 416.]

sworn "that he received the commission from the hands of one "of the commissioners therein named, and that it has not been "opened or altered since he so received it." (*a*) But one of these parcels having been found by two travellers on the road, and taken by them to the Master, it was received, on their affidavit that they had not opened or altered it. (*b*) And there are instances of their having been sent by public conveyances without its vitiating the proceedings. (*c*) [83]

Violation of secrecy.

A commissioner violates his duty and his oath if he discloses what has passed, even to the party who nominated him, until after publication, [and each clerk is no less bound to secrecy.] (*d*)

Old practice as to custody of the drafts.

The paper drafts of the depositions must be sealed up carefully, and kept in safe custody by some of the commissioners; sometimes they are divided through the middle into two parts, and the halves kept by different commissioners; more usually the plaintiff's and defendant's commissioners keep each the drafts of the adverse party. It is of importance that they should be carefully preserved, because when the depositions have been lost, (as [by fire] or shipwreck, for instance,) the drafts have been allowed to be used. (*e*)

Why to be preserved.

New practice, as to payment to commissioners.

[By another of the Orders of May, 1845, No. 110. "The commissioner is, for the performance of his duty as such commissioner, entitled to receive the following sums of money; viz.

For every day in which he is necessarily and without any default of his own, detained in the execution of the commission, for his expenses the sum of two guineas.

For every day in which he is *bonâ fide* employed in the examination of witnesses the further sum of three guineas.

For every mile that he travels directly from his place of

(*a*) Hinde's Ch. Pr. 351, *sed vide supra*, p. 110, n. (*f*).

(*b*) Smales *v.* Chayter, Dick. 99.

(*c*) Elliot *v.* Williams, Dick. 325.

(*d*) [See forms of their respective oaths, *supra* pp. 99 and 100.] A bill for the performance of an agreement, based on the communications of commissioners, was dismissed on the ground of public policy, in Cooth *v.* Jackson, 6 Ves. 31.

(*e*) Jones *v.* Dowthorne, Dick. 352; Burn *v.* Burn, 2 Cox, 426. [But the Court refused to allow copies of depositions to be recorded and exemplified, where the originals had been lost, and in trials at law, subsequent to the dismission of the bill, the witnesses had sworn contrary to their depositions; Brabant *v.* Perin, 2 Ch. Rep. 36.]

residence to the place where he opens the commission, and from place to place where the commission is adjourned, and from the place where he last acts in the execution of the commission to his place of residence the sum of eighteen pence. (*a*)]

Commission to examine abroad.

If any necessary witness reside abroad, (*b*) a commission to examine them may be obtained, on motion after two days' notice; (*c*) but, before it is granted, (*d*) the Court will require to be satisfied by an affidavit made by the party himself, (*e*) and by other means, if that be not sufficient, that the application is made *bonâ fidê* and not for the mere purpose of delay. (*f*) The rule is the same whether the proceeding arises in the progress of a suit in equity or whether it is founded on a bill of discovery, filed in order to assist the party in an action at law. (*g*)

Affidavits to support motion.

[84]

In the case of *Oldham* v. *Carleton*, (*h*) it was argued that "it is sufficient for the affidavit to state the name of the proposed witness, and that his evidence is material, and that he is abroad; and the Registrar being of opinion that this was sufficient, the motion was granted." But in a more recent case this was treated as no authority, being "nothing more than the imperfect recollection of the registrar as to the practice." (*i*) It

(*a*) [Sand. Ord. 1016. A bill praying discovery and a commission, the defendant cannot have the costs of the discovery till the return of the commission; Anon. 8 Ves. 69; see 1 Newl. Ch. Pr. 594; 2 Fowl. 295.]

(*b*) [At law to obtain a commission, it is sufficient that the witnesses are out of the jurisdiction, and it is immaterial that the action is of a criminal nature; Norton *v.* Melbourn Lord, 3 Bing. N. C. 67; 3 Sc. 398, and 5 Dowl. 181; but see Reg. *v.* Wood, 9 Dowl. 310.]

(*c*) [At what stage in the proceedings, as to pleadings, &c., *vide infra*. It may be on bill praying it, which is the ordinary case; or by motion, under particular circumstances, though bill not praying it; Kensington *v.* White, 3 Price, 164: or in suits at issue; or for further evidence before the Court, *vide infra*; or, the like before the Master, *vide infra*.]

(*d*) [That the exercise of the jurisdiction in this matter is to be guarded; see Moody *v.* Steele, 2 Anstr. 386; Angell *v.* Angell, 1 S. & S. 91; Lousada *v.* Templer, 2 Russ. 561, and other cases we shall have occasion to refer to below.]

(*e*) [Or his solicitor,] Bonham *v.* Leigh, 5 Pri. 444

(*f*) [A bill for a commission to examine abroad must allege that an action has been brought; Angell *v.* Angell, 1 S. & S. 91; nor is Moodalay *v.* Martins contrary, ibid, 88-90; S. C., Dick. 652.]

(*g*) [Either party at law is entitled to the assistance of the Court of Equity, to obtain a commission to examine abroad; Davis *v.* Turnbull, 6 Mad. 232; where, see when substituted service is allowed in such cases, ibid.]

(*h*) 4 B. C. C. 88; followed, but apparently ill-considered, in Rougemont *v.* The Royal Exchange Insurance Comp., 7 Ves. 304; 2 Russ. 550, 553.

(*i*) [Mendizabel *v.* Mochado,] 2 S. & S. 483.

was therefore adjudged, upon the principle that by allowing loose affidavits, an opportunity was given of indefinite delay with little danger of the penalties of perjury, and upon the authority of older cases, (*a*) that the affidavit ought so far to state the points of the intended evidence, as to enable the Court to judge whether, if obtained, it would be material. (*b*) A question also as to the legal effect of the evidence sometimes requires consideration where it is intended to aid a trial at law; whether, for instance the facts, if proved, would constitute a defence at law. (*c*)

Names of the witnesses.

Whether the names of the intended witnesses ought to be divulged, is a distinct question. (*d*) The objection to it is that it might expose them to being tampered with. (*e*) In *Oldham* v. *Carleton*, (*f*) it was spoken of as a matter of course. But in *Rougemont* v. *The Royal Exchange Co.*, (*g*) although the case of *Oldham* v. *Carleton* was referred to, Lord Eldon allowed the commission without any mention of the witnesses' names. They were however pointed out with almost as much precision as if they had been named, for they were called the persons who had sold the disputed goods by public auction at Hamburgh. (*h*) In *Shackell* v. *Macaulay*, (*i*) and *Bowden* v. *Hodge*, (*k*) commissions were granted though they were no affidavits of the names, and in *Mendizabel* v. *Machado* (*l*) Lord Eldon, after resigning the seal, having expressed an opinion that a commission might issue without the names having been disclosed, Lord Lyndhurst made the order accordingly.

(*a*) Moody *v.* Steele, 2 Anstr. 386; and another.

(*b*) [By an Order of 26th Oct. 1685, Jeffreys, C., "Where any person, plaintiff or defendant, shall ground any motion or petition on an affidavit of material witnesses to examine, whereby to gain longer time to examine, such affidavit shall not only contain the names of the chiefest of such witnesses, but the points on which such witnesses are desired to be examined; to the end the Court may see, whether such points be material to be examined, and whether before or after the hearing,—that all delays, heretofore occasioned by unnecessary examination, may be avoided for the future;" Sand. Ord. 366.]

(*c*) Lousada *v.* Templar, 2 Sim. 561.

(*d*) [A bill having been filed, for discovery and a commission to examine witnesses abroad, in aid of an action at law, a motion that plaintiff might communicate to the defendant the interrogatories exhibited by him was refused, in Butler *v.* Bulkeley, 2 Swanst. 373.]

(*e*) [But see the Order of 1685, *supra*, n. (*b*).]

(*f*) 4 B. C. C. 88.

(*g*) 7 Ves. 304, 2 Russ. 552.

(*h*) 2 Russ. 552.

(*i*) 2 Russ. 550, note.

(*k*) 2 Swanst. 258.

(*l*) 2 Russ. 540.

[85] In arguing the last named cause, cases were cited on the other side in which the names had been mentioned. (*a*) In *The Royal Insurance Co.* v. ——, Lord Hardwicke considered the omission as one which must of necessity be supplied, and the names of two witnesses, out of several, were the next day inserted. (*b*) It has been mentioned that in *Oldham* v. *Carleton*, (*c*) it was spoken of as an indisputable rule. And the extra-judicial opinion of the Vice Chancellor in *Mendizabel* v. *Machado* was strongly in its favour, (*d*) though the ultimate decision was different. (*e*)

The Court to be satisfied.

The result of examining these cases, and others which afford instances of insufficient affidavits, (*f*) seems to be that there is no decided rule on the subject, except that the Court must be satisfied of there being *bonâ fide* ground for a commission, and the Judge therefore requires some circumstances to be disclosed; and in making up a sufficient case for his satisfaction, the names of the witnesses will be found in most cases an obvious, in some a necessary, ingredient. (*g*)

(*a*) Noble *v.* Garland, 2 Swanst. 545.

(*b*) From Serjeant Hill's MSS., 2 Russ. 553, note.

(*c*) 4 B. C. C. 88.

(*d*) 2 S. & S. 487.

(*e*) [But see the Order of 1685, in n. (*b*), to last page.]

(*f*) [Anon., 1 Anstr. 201.] Moody *v.* Steele, 2 Anstr. 386; Shedden *v.* Baring, 3 Anstr. 886. The following is a MS. note of Mr. Phillimore's. "Serjts.' Inn, Mar. 1st, 1805. The "Court refused to allow a motion of "Mr. Leach's for a commission to exa- "mine witnesses abroad; first, on the "ground that the answer to the bill "had not been put in; but, secondly, "on account of the affidavit filed in "support of it not having stated the "names of the witnesses to be examined, "or the points to which they were to "be examined. This last objection was "held in all cases fatal." [It would seem by a literal adherence to the Order of 1685, set forth in last page, n. (*b*).]

(*g*) [The commission was granted, under the circumstances, in Chitty *v.* Selwyn, 2 Atk, 359; see also Akers v. Chancy, 2 Bro. C C. 273; Carbonell *v.* Bessell, 5 Sim. 636; Cock *v.* Donovan, 3 V. & B. 76; King *v.* Allen, 4 Mad. 247; Bowden *v.* Hodge, 2 Swanst. 258; Kensington *v.* White, 3 Pri. 164, *sed vide* 2 S. & S. 87; Noble *v.* Garland, 19 Ves. 372; S. C., Cooper, 222; *Ex parte* Coles, Buck. 293; see also Laragoity *v.* Att. Gen., 2 Pri. 172; Woodhead *v.* Boyd, 6 Pri. 101; Robinson *v.* Soames, 1 Yo. & Jer. 578; Clovin *v.* Campion, 8 Bli. N. S. 523. It was refused in Cojamoul *v.* Verelst, 4 Bro. P. C. 407; Martin *v.* Nicolls, 3 Sim. 458, and in Chimelle *v.* Chauvet, 1 Yo. 302. But as every case will present its own peculiar circumstances, in the report referred to, for brevity sake, such are here omitted. The result may be as in the text: but see the Order *supra*, p. 113, n. (*b*); *vide etiam* Macaulay *v.* Shackell, 1 Bli. N. S. 96. The rule, grounded indeed on the principle, is similar at law. There also the Court is to be satisfied; whether some of the witnesses' names, as in Beresford *v.* Easthope, 8 Dowl. P. C. 294, or none, as in Cow *v.* Kinnersley, 6 Man. & Gr. 981, are mentioned in the affidavits in support of the application: and whether the nature of the evidence transpire, or, as in Strachan *v.* Groen, 9 Jur. 554, do not.]

In other respects the Court exercises a very wide discretion with regard to these commissions. In one instance a common injunction having been dissolved on the merits, after pending ten years, a commission prayed for to prepare a defence against an action, new but substantially the same, was refused with costs, on the ground of delay. (*a*) Where an order had been made by the Chief Justice of the King's Bench under the stat. 1 Wm. 4, c. 22, § 4, for the *vivâ voce* examination before a barrister, of persons about to leave the country, which order had not been acted upon, a commission was granted after they were gone, to examine them abroad. (*b*) A will has been ordered to be taken abroad to be proved, upon security being given to return the same: but this cannot be done if any person interested in the will refuses to consent to its removal from the Prerogative Court. (*c*) Frequently if the party applying for the commission be in possession of the property, he will be ordered to pay the whole or part of it into Court. (*d*) But this is not a fixed rule, at least in the Court of Chancery. (*e*) If either party at law applies for a commission, and his opponent retires from the jurisdiction, the Court will direct service of the *subpœna* on his attorney at law. (*f*) A commission to examine abroad in aid of an action at law is so far a legal proceeding that an injunction from the Exchequer prevented a party from obtaining a commission from the Court of Chancery. (*g*) It is not

Discretion exercised by the Court.

[86]

(*a*) Todd *v.* Aylwin, 1 Sim. 271; Hart *v.* Strong, 2 Russ. 559, is another instance.

(*b*) Grinnell *v.* Cobbold, 4 Sim. 546. [Affidavit in support of an application at law for a commission to examine witnesses in India, under stat. 1 Wm. 4, c. 22, s. 4, need not state the nature of the evidence the witness is expected to give; Strachan *v.* Green, 9 Jur. 554.]

(*c*) Frederick *v.* Aynscombe, mentioned Ambl. 343. [On the other hand, a will of personal estate, which lies in a foreign country, may be proved here; see Jauncey *v.* Sealey, 1 Vern. 397.]

(*d*) Ebden *v.* Prince, 8 Pri. 290; Noble *v.* Garland, Coop. 222; Foderingham *v.* Wilson, ib. note; Jackson *v.* Strong, 13 Pri. 314. [It is a question of circumstances; Marryatt *v.* Noble, 1 M'Clel. & Yo. 101. And so, at law, where defendant was an executrix, and willing to bring the amount claimed into Court, a commission to examine witnesses abroad was granted, although the names of none of the witnesses given; Cow *v.* Chinnersley, 6 Man. & Gr. 981. In such a case, *semble*, the Court easily satisfied that no delay is sought.]

(*e*) Cock *v.* Donovan, 3 Ves. & Bea. 79.

(*f*) Davis *v.* Turnbull, 6 Mad. 234.

(*g*) Novaes *v.* Dorrien, 4 Mad. 362, [and see Laragoity *v.* Atty. Gen. 2 Pri. 172, order that the depositions should be reserved in evidence on the trial at law. Where the party applying for a commission to examine witnesses appears from the nature of his case to be

incidental to discovery, therefore it does not follow that when the Court refuses discovery it will also refuse the commission. (*a*)

A discretion is frequently used with respect to the subject-matter. A commission was granted to examine at Paris as to the extent of jurisdiction of a Court there, but the party obtaining it was forbidden, under penalty of paying the costs, to inquire into the original constitution of that Court. (*b*) Lord Hardwicke refused to grant one, saying that the course of the Court is that where an account must necessarily be directed at the hearing, a commission before the hearing shall never be granted to examine witnesses beyond sea, when the granting such commission will delay the directing the account: (*c*) the [87] proper time to apply for such commission is after the account is directed. (*d*) There is an instance in which a party applying for one in order to prove a legacy to be accumulative, was required to swear that she believed it to have been so intended the testator. (*e*)

Places. There is scarcely a limit to the places or countries to which commissions will be sent, or which may be included in one commission. They have even been granted to examine witnesses residing in an enemy's territories. (*f*) But if it be thought more convenient in such a case, the nearest neutral post may be named as the place for executing it. (*g*) One was sent to Bencoolen [in the East Indies (*h*)] notwithstanding the stat. 13 Geo. 3, c. 63, § 44. (*i*) Four places in the West Indies were com-

entitled to it, the granting an injunction, in the mean time, is no more than a necessary consequence of that right; Nicol *v.* Verelst, 4 Bro. P. C. 416.]

(*a*) Thorpe *v.* Macaulay, 5 Mad. 219.

(*b*) Grace *v.* Lady Stafford, 2 Ves. 556.

(*c*) [And now the preliminary account might be taken, under the Order of May, 1839, No. 5, in certain cases therein provided for; see Sand. Ord. 852.]

(*d*) Adams *v.* Bohun, 3 Barn. 270, [*vide supra*, n. (*c*).]

(*e*) Coote *v.* Coote, 1 B. C. C. 448; and see Laragoity *v.* Atty. Gen. 2 Pri. 172.

(*f*) Cahill *v.* Shepherd, 12 Ves. 335.

(*g*) ——— *v.* Romney, Ambl. 62.

(*h*) [As to the East Indies, *vide infra*, and see Dan. Ch. Pr. by H., 895, n. (*c*). A writ in the nature of a *mandamus*, was directed to the Chief J. and J. of the Supreme Court of Judicature at Madras, for the examination of witnesses, in Murray *v.* Lawford, 6 Sim. 573.]

(*i*) Baskett *v.* Toosey, 6 Mad. 261. [A commission to examine witnesses in India under stat. 13 Geo. 3, c. 63, s. 44, should recite the pleadings at length; Murray *v.* Lawford, 7 Sim. 139.

When two years had elapsed since the granting a commission to examine

prised in one, though the names of two witnesses only were mentioned; the answer having admitted that the transactions concerning which inquiries were to be made had taken place in the West Indies. (*a*) A fuller affidavit is required if the place is distant, and consequently the delay likely to be great. (*b*)

Proper time to apply.

The regular time to apply for a commission is when the cause is at issue; (*c*) and the Court of Exchequer formerly adhered strictly to this rule; (*d*) but in Chancery it has frequently been granted on motion with notice, if the defendant is in contempt for want of an answer, or has moved for further time to answer: (*e*) and the Court of Exchequer has lately followed the same practice. (*f*) In a suit for perpetuating testimony, a defendant who had cross-examined without producing witnesses, afterwards obtained a commission to examine abroad. (*g*)

[88]

But (if necessary) may be granted at any time.

If a Master certifies that it is necessary, (*h*) or if the Court requires it for its own satisfaction, it may be granted at any time. (*i*) There is an old case in which the Court granted one upon new matter stated at the hearing and not in issue before. (*k*) It is a question whether when the Court will not stay the trial

witnesses in India and it was not yet returned, the injunction was dissolved in Penney *v.* Edgar, 1 Anstr. 276. Note, the time, two years; being prior to the existence of an overland mail.]

(*a*) Jackson *v.* Strong, 13 Pri. 311.

(*b*) Moody *v.* Steele, Anstr. 386.

(*c*) [And not before answer filed, unless defendant is in contempt.] King *v.* Allen, 4 Mad. 247.

(*d*) Lowther *v.* Whorwood, 2 Fowl. 95; [Noble *v.* Garland, 19 Ves. 376. Before time for answering expire it was refused, in Chemiant *v.* Delacour, 1 Mad. 210. [On the coming in of the answer, under certain circumstances, it was granted, although not prayed by the original bill and the injunction in the mean time contained; Kensington *v.* White, 3 Pri. 164.]

(*e*) Chemiant *v.* Delacour, 1 Mad. 208; [and plaintiff having obtained the common injunction for want of an answer, was held entitled to a commission and to extend the injunction to stay trial;] Bowden *v.* Hedge, 2 Swanst. 262; Mendizabel *v.* Machado, 2 Russ. 545. [And before the answer, the object of the suit being merely to obtain evidence for an action; Noble *v.* Garland, *ut supra.* So before the answer (in a suit for perpetuating testimony) where the defendant had been attached and still refused to answer; Lancaster *v.* L., 6 Sim. 439.]

(*f*) Hibberson *v.* Cambridge, 13 Pri. 797.

(*g*) Sheward *v.* Sheward, 2 Ves. & Bea. 116.

(*h*) [As to which certificate, &c., see Bamford *v.* B., 2 Hare, 642, and Raner *v.* Mitford (alluded to below) a Hessian pedigree case, where the Master issued his certificate, whereupon a commission was granted to examine in Germany; MS., V. C. Knight Bruce, Trin. Term 1845, *et vide infra*, P. III. ch. 5, § 2.]

(*i*) [Though not prayed by the bill; Kensington *v.* White, 3 Pri. 164, in the Exchequer.]

(*k*) [Upon terms of not delaying an action ordered to be tried at law;] Newland *v.* Horseman, 2 Ch. Ca. 74.

at law, it will grant a commission; the party obtaining it would use it as a strong ground to induce the Judge at common law to postpone the trial, and by such or other means, or even by accidental circumstances, he might possibly get it returned in time. (*a*)

Form of the order.

The order usually directs that the adverse party's clerk in Court (*b*) in a limited time shall join and strike commissioners' names, and shall name an agent resident in the place where the commission is to be executed (*c*) to whom notice of the execution of the commission is to be given; and that service of the notice upon such agent may be good service upon the adverse party, or in default of joining in commission or naming an agent, that the commission may issue *ex parte*. (*d*)

Striking commissioners' names.

For a commission abroad eight commissioners' names are sent in on each side, and four on each side are left. If therefore an agent is not named in the order, it is necessary either to serve the notices on each of the four adverse commissioners, or to apply by motion to be at liberty to serve any one or two of them with notice of the execution of the commission. (*e*) In a case where a commission having been sent into Sweden, the King there ordered that the examination should take place before his own Courts, Lord Hardwicke would, in furtherance of justice have held it properly executed, but he altered his mind when he found that it had been taken openly. He declared moreover that he would not send another commission over under the seal of Great Britain to be treated in the manner this had been. (*f*)

(*a*) Kent *v.* Strong, 2 Russ. 559. [Upon an issue, out of Chancery, the Court of law in which the trial is to take place may issue a commission to examine witnesses abroad; Bordieu *v.* Rowe, 1 Sc. 608; but see *ex parte* Coles, Buck. 293.]

(*b*) [Or now, by the Order of 1842, No. 16, the party or his solicitor; Sand. Ord. 920.]

(*c*) [In Hamond *v.* Wordsworth, Dick. 381, the costs of a solicitor attending the execution of a commission abroad were disallowed.]

(*d*) Hinde's Ch. Pr. 362. [New commission granted to cross-examine plaintiff's witnesses abroad, upon subsequent discovery of matter material for such examination; but held that the plaintiff could only be allowed to re-examine on a special case being made, and then only as to matters not comprised in the former interrogatories. For the form of the order in such cases, see Hanover K. of, *v.* Wheatley, 4 Beav. 78.]

(*e*) Anon. 3 Atk. 633.

(*f*) Gason *v.* Wordsworth, 2 Ves. 336. [In the 12 Jac. I, 1614-15, Lord Ellesmere, C., the Court issued a "commission to examine witnesses in England, in a suit in Ghent." The

Interpreters.

It has been mentioned that witnesses who are foreigners must be examined in English, and the interrogatories must for that purpose be translated into the language of the deponent, and his answer translated, by a sworn interpreter, and the examination returned in English. (*a*) It is consequently very usual to have inserted in the order for a commission abroad "that the "commissioners be authorized to swear one or more interpreter "or interpreters, who shall, upon his or their oath, solemnly "swear, well and truly to interpret the oath or oaths and in- "terrogatories, which shall be administered and exhibited to "the witness to be examined, out of the English language, "into the language spoken by the said witnesses, and also to "interpret their depositions taken to the said interrogato- "ries." (*b*) It is however questionable whether this clause is necessary, for in a commission to take an answer abroad, where it is never inserted, the power to employ an interpreter, when necessary, was held to be implied, under the power to take the answer. (*c*) If however the examination has been entirely in the Foreign language, the fault does not appear to be irremediable, for Harrison directs in such a case that an application be made, by motion or petition, that some notary public, or other person (naming him) may be appointed to translate the depositions into English, and that the parties applying may be at liberty to read an English copy of such translation at the hearing. (*d*) A motion however to deliver them out to be translated was refused. (*e*)

[89]

whole order is both curious and interesting; and, but for brevity sake, should be inserted here. Suffice it, the Court ordered a commission, and the depositions to be returned into Chancery in England, and that exemplifications thereof might be used elsewhere; Sand. Ord. 87-8. It would seem (by the way) that the Court of Chancery, in the case of Gason *v.* Wordsworth, cited above, claimed much more than it was ready to allow to Foreign Courts here; as far, at least, as this Ghent case is any example.

As to cases of difficulty respecting the parties to whom a commission is to be directed by a Court of Law; see Mills *v.* Welbank, 3 Sc. N. S. 177.]

(*a*) [*Vide supra*, p. 68, n. (*c*). See the Order set forth in] Lord Belmore *v.* Anderson, 4 B. C. C. 90, Belt's ed. S. C. 2 Coxe, 288.

At law, it seems, the answers need not however be taken down in English; if translated at leisure some weeks afterwards, it will be sufficient; Atkins *v.* Palmer, 4 B. & A. 377.

(*b*) Bowden *v.* Hodge, 2 Swanst. 260; and see the note there.

(*c*) Loughman *v.* Novies, 6 Pri. 110.

(*d*) 1 Harr. Ch. Pr. 521, ed. of 1790.

(*e*) Fauquier *v.* Tynte, 7 Ves. 292.

[The interpreter is also sworn to keep the said depositions secret until publication shall duly pass in the cause. (*a*)]

Execution of commission.

In the returning of these commissions (*b*) there is, from the nature of the thing, a little more laxity than when they are in England. (*c*) In an old case leave was given to send and return one by the post. (*d*) In another the commission was ordered to be received and filed when the messenger who [90] brought it, sealed up, from Lisbon, had sent it, by coach, still sealed, to the solicitor in London, being himself detained in quarantine. (*e*) Usually some person is entrusted to take it out and return with it, and he makes an affidavit that he received it from the commissioners. (*f*)

(*a*) [See the Order, in Belt's ed. B. C. C. vol. 4, p. 90, *ut supra*.]

(*b*) [The Court has not fixed any time within which such commissions are to be returnable, but will inquire in each case, whether there has been any unreasonable delay; Wake *v.* Franklin, 1 S. & S. 95.]

(*c*) [But the sending out and return should be proved by affidavit; Bourdillon *v.* Alleym, 4 B. C. C. 100.

Where the witnesses of the plaintiff had been examined and (it would seem under some mistake) the commission was returned; after which, defendant examined witnesses, before some of the commissioners, and the depositions and interrogatories were sealed up and sent to England. A motion was made to annex them to the commission and the deposition on the part of the plaintiff, it was so ordered by the Court, upon the consent of the plaintiff, which was given, upon the intimation of an inclination on the part of the Court otherwise to grant the defendant a new commission; Irving *v.* Viana, 1 Yo. & J. 416.]

(*d*) Newland *v.* Horseman, 2 Ch. Ca. 74. [And in the Chancery of Ireland where the depositions of witness examined abroad had by a mistake been sent to the solicitor of the plaintiff by the post. The packet being delivered unopened to the Master and the facts verified by affidavit, the depositions were reserved; Kennedy *v.* K., 1 Hog. 311.]

(*e*) Bourdieu *v.* Trial, 2 Fowler, 95.

(*f*) 2 Mad. Ch. Pr. 254. [As to costs of such commission, see Jackson *v.* Strong, 13 Pri. 309; Noble *v.* Garland, 19 Ves. 376, S. C. Coop. 222, and Dan. Ch. Pr. by H. 908.

For method adopted when there was a necessity for sending out certain documents, viz. American notes, with the commission to examine abroad; see Clinton *v.* Peabody, 7 Man. & G. 399.]

EXAMINATION OF WITNESSES DE BENE ESSE. (*a*)

Examination *de bene esse.*

WHERE there is sufficient reason for apprehending that the testimony of any material witness may be lost before the regular time for examination arrives, leave may be obtained to examine him *de bene esse;* that is, to take his evidence, (either by commission or through the Examiner,) and to have it preserved by the Court ready to be used in the event of the impossibility of re-examining him at the proper time. (*b*)

Grounds for.

The grounds for allowing this proceeding are generally stated to be, (*c*) the dangerous illness (*d*) or precarious state of health of the witness; (*e*) his age being more than seventy; (*f*) his intending shortly to leave the kingdom; (*g*) or his being the only witness who can speak to a material point. (*h*)

(*a*) [As to the origin of the practice of examination *de bene esse*, and the distinction between this and an examination of witnesses *in perpetuam rei memoriam*, (of which hereafter,) see Dan. Ch. Pr., by H., 909.]

(*b*) [But if there be such possibility, the examination *de bene esse* is not available; Cann *v.* Cann, 1 P. Wms. 567.]

(*c*) [The wrong-doing of a defendant by standing out process to contempt, and preventing the plaintiff joining issue; Coventry *v.* Athill, Dick. 355; Cann *v.* Cann, 1 P. Wms. 567. But now the course in such a case seems to be, to file a (so called) traversing order, under the more recent Orders of May, 1845; Sand. Ord. Index *voce* Traversing note.]

(*d*) [At law, a rule to examine, on interrogatories, a witness alleged to be confined to her bed by infirmity, without the affidavit of a surgeon stating the nature of the complaint, and belief that the witness would never be able to attend the trial, was refused, in Davis *v.* Lowndes, 7 Dowl. 101.]

(*e*) Bellamy *v.* Jones, 8 Ves. 21; Jesson *v.* Greenaway, 2 Fowler, 122.

(*f*) [Bugnold *v* Green, Cary, 48;] Rowe *v.* ——, 13 Ves. 261; [Herbert *v.* Mayne, 2 Swanst. 198. After verdict upon trial of an issue, on the suggestion of an intention to move for a new trial, an order was granted to examine *de bene esse*, a witness above seventy; Anon, 6 Ves. 573; and see James *v.* Newman, Dick. 338.]

(*g*) [Lydeker *v.* Power, Dick. 112. In one case indeed, where one witness was in her 70th year, and very weak and infirm, her case was held not to come within the rule; but another witness being a soldier, under orders to proceed within six days on foreign service for a period of six or seven years, his examination *de bene esse* was allowed; M'Kenna *v.* Everitt, 2 Beav. 188. When a witness is going abroad, an *ex parte* order, for taking his examination *de bene esse*, is not irregular; and a motion to suppress such depositions not asking to discharge the order, and merely showing it to have been irregular, from circumstances, is not sufficient; as the Court, for the purpose of the motion, will assume it to be regular; M'Intosh *v.* Gt. West. Rail. Co., 1 Hare, 328;] and see Botts *v.* Verelst, 2 Dick. 454.

(*h*) Hankin *v.* Middleditch, 2 B. C. C. 251. [Although such only witness be not old or infirm, yet his examination may be so taken; Shirley *v.* Ferrers, 3 P. Wms. 77; S. C., Mos. 389; Brydges *v* Hatch, 1 Cox, 423. But the affidavit should state the particular points which his evidence is meant to prove; Pearson *v.* Ward, 1 Cox, 177; S. C., Dick. 648. When the ground of application is, that the witness to be examined is the only witness to a material fact, the

But these, especially the last, are manifestly very indefinite, and the Court is not anxious to limit them strictly, but rather to refer the question to substantial justice. (*a*) At the same time it discountenances the proceeding when it is not absolutely necessary, because if it happens that the witness is not unable to be examined again with the other witnesses, he is under the constraint and obligation of having to reswear at his second examination exactly what he swore at his first. (*b*)

Reasons for limiting.

When order granted.

The order has been granted where the witness was not older than sixty, he being resident in Virginia. (*c*) It has been granted when he was going only to Scotland. (*d*) In one case two persons, the only two who had knowledge of the material facts, were ordered to be examined *de bene esse* without any regard to their age. (*e*) Lord Eldon was willing to have granted it in a question of legitimacy depending upon a chain of distinct circumstances in the knowledge of different individuals, the defendant, the questionable heir, being kept out of the way. (*f*) It was, however, refused where the witness was a prisoner charged with a capital felony, though counsel contended that he was within the principle applying to a person under a dangerous disease. (*g*) It was refused too when the East India Company applied to examine some of their own captains who were on the point of sailing, because, as the Court said, the Company created the necessity itself, and had it in its power to employ other captains. (*h*)

[91]

Motion and affidavits.

For making this application it is necessary [it should be in a suit, or, at least,] that a bill should have been filed; and [the

application cannot be made *ex parte*, but upon notice, and the affidavit must state the facts to which it is proposed to examine him; and it is not enough to state a belief that the witness is the only one; the grounds of such belief must be stated; Hope *v.* Hope, 3 Beav. 317.]

(*a*) Shelly *v.* ——, 13 Ves. 56.

(*b*) Bellamy *v.* Jones, 8 Ves. 32.

(*c*) Fitzhugh *v.* Lee, Ambl. 65.

(*d*) Botts *v.* Verelst, 2 Dick. 454. [But being in Ireland, he must be examined in chief; Birt *v.* White, Dick. 473.]

(*e*) Lord Cholmondeley *v.* The Earl of Oxford, 4 B. C. C. 157, [*et vide supra*, p. 121, n. (*h*).]

(*f*) Shelley *v.* ——, 13 Ves. 56.

(*g*) Anon. 19 Ves. 321.

(*h*) E. I. Co. *v.* Naish, 2 Fowl. 128; [and because the defendant, from the shortness of the time, would not be prepared to cross-examine him; S. C. Bunb. 320. After a commission to examine abroad had been sent off, before it had reached its destination, a witness returned to England, and a motion was made to examine him *de bene esse*; but that was refused; it was held the bill must be amended; Atkins *v.* Palmer, 5 Mad. 19.]

motion] should be supported by affidavit. (*a*) There is no instance of permitting the examination before the appearance of the defendant, except where, in due time after service of *subpœna*, there being no appearance, the Court has held the defendant to be in contempt, and has made the order. But as an infant cannot be in contempt, a difficulty arose from that circumstance before Lord Eldon, who at length granted it, leaving the objection open. (*b*) If the ground of application is, that the witness is the only person who can prove a certain fact, the affidavit must declare distinctly that he can prove it, and that no one else can: an agent's swearing to his having been informed by the witness that he can prove the fact, and to his own belief that no other person can, is not sufficient. (*c*) When, as to plaintiff;

The defendant must have put in his answer before he can as to defendant.

(*a*) [If the witness is required to be examined *de bene esse* with a view to reading his depositions in a suit in this Court, the order for his examination may be obtained, on motion, in that suit; but if his testimony is wanted in an action at law, a bill must first be filed for his examination, with the proper affidavits annexed; and an application is then made to the Court, by motion, which may be before appearance, if after service of *subpœnâ*; Wilson *v.* Wilson, Newl. Pr. 286. But in a case in Ireland, after publication, a decree, and an issue directed, a witness, whose testimony was required on the trial of the issue, having been examined *de bene esse*, by an order obtained, on petition, in the suit, it was held, that he had been irregularly examined, and that a bill should have been filed for his examination *de bene esse*; Stratford *v.* Aldborough Lord, 2 Moll. 326. By an order of the Court of Chancery in Ireland, 12th Feb. 1726, no commission to examine *de bene esse* to be applied for, until process has been taken out, on the bill; and where the parties have not appeared, and are in the kingdom, they are to have notice of the time and place of the speeding of such commission; and if the nature of the case will not admit of the usual notice, the Court will make a proper order; Ord. Ch. Ir., O'Keefe's Ord. 32. And in the Chancery of Ireland liberty to examine *de bene esse*, a witness about to leave the country, may be granted upon application made before answer; but when the answer is come in, except in very special cases, this cannot be done; Byrne *v.* Byrne, 2 Moll. 440. And the place of residence and description of the witness sought to be examined *de bene esse*, must be given in the affidavit; O'Farrell *v.* O'Farrell, 2 Moll. 364.]

(*b*) [On a bill filed to perpetuate testimony (as to which, *vide infra*) *subpœnâ* had been served, but before appearance of infant defendants (*quasi* in contempt by a messenger's return that they had absconded and were not to be found) examination *de bene esse* was granted to plaintiffs, on an affidavit of the materiality of the evidence and the danger of its loss; plaintiff's undertaking to proceed with all due diligence to issue, and examination in chief to be proved impossible, before publication of the depositions *de bene esse*.] Frere *v.* Green, 19 Ves. 319. [When the witness is *above* seventy years old, it is a motion of course to examine *de bene esse*, even before appearance, and it is no objection that reference of the bill for impertinence is still pending; Prichard *v.* Gee, 5 Mad. 364.]

Depositions taken *de bene esse*, before the defendant had put in his answer or joined issue, were admitted to be read, in Southwell *v.* Limerick Lord, 9 Mod. 133.]

(*c*) Rowe *v.* ——, 13 Ves. 261, [*et vide* Hope *v.* Hope, *ut supra*, p. 121, n. (*h*).]

obtain this order; (*a*) and, of course, before he can regularly examine witnesses under the plaintiff's commission, which at a proper time, with permission of the Court, he may do. (*b*)

[92]

Ex parte.

If the bill has been filed solely to examine witnesses *de bene esse* in aid of a claim which the plaintiff is pursuing at law, (*c*) it is necessary that an action should have been actually brought, or the bill itself will be demurrable. (*d*) When the witness is above seventy, [or about to go abroad, (*e*)] it is a motion of course, (*f*) but under all other circumstances a notice is necessary. (*g*)

Interrogatories in the courts of law.

The courts of law were always able, by means of the power which they can exercise, over the plaintiff by postponing the trial, and over the defendant by withholding the judgment, to extort from either party a consent to have an examination upon interrogatories taken *de bene esse*, either before one of the Judges of the Court or before commissioners specially appointed; the process being very similar to an examination

(*a*) Woodmas *v.* Warner, 2 Fowl. 131; [and see Atwood *v.* Hurrell, 2 Fowl. 126: but see Brown *v.* Child, 3 Sim. 457.]

(*b*) It has been done before answer, though it is said not to be regular; Masden *v.* Bound, 1 Vern. 332.

(*c*) [Witnesses having been examined *de bene esse*, with a view to a trial at law, the examination of another witness is not permitted without strong circumstances; as upon a second ejectment, brought after verdict for the defendant, the examination of a witness produced at the trial, who had not been examined under a bill to perpetuate testimony was permitted; not as to other witnesses; Palmer *v.* Aylesbury Lord, 15 Ves. 299.]

(*d*) Angell *v.* Angell, 1 S. & S. 92; but see Phillipps *v.* Carew, 1 P. Wms. 117.

(*e*) [M'Intosh *v.* Gt. W. Rail. Co, 1 Hare, 330, and cases cited, ibid. n. (*d*).

On demurrer allowed to a bill for commission to examine *de bene esse*, the plaintiff, having on an *ex parte* application obtained an order to examine witnesses, was ordered to pay to the defendant, besides the usual costs of demurrer, the costs of the depositions, but not of those taken on cross-examination; Dew *v.* Clarke, 1 S. & S. 115.

(*f*) Rowe *v.* ——, 13 Ves. 261; [Tomkins *v.* Harrison, 6 Mad. 315.]

(*g*) [Bellamy *v.* Jones, 8 Ves. 31. Notice must be given to the other party before an examination *de bene esse* should be proceeded on, so as to give him an opportunity of joining in the commission; Loveden *v.* Millford Ld. 4 B. C. C. 540, *sed vide supra*, p. 121, n. (*c*).

An examination of witnesses *de bene esse* having taken place in Sweden; when the Council there refused to allow the execution of a commission for examining them in chief, the depositions were allowed to be read; Gason *v.* Wordsworth, Amb. 108; S. C. 2 Ves. 325, 336.

As to the publication and use of depositions taken *de bene esse*, the witness being dead, abroad, or otherwise utterly unable to attend, *vide infra*. As to examinations of witnesses *de bene esse*, when allowed by the Ecclesiastical Courts, see Herbert *v.* Herbert, 2 Hag. Ch. Rep. 264, and when not allowed by same Courts, see Hibbin *v.* Calemberg, 1 Lee's Rep. 558; Robbins *v.* Waseley, ibid. 149.] The evidence which is produced upon investigations in the Master's office, will be more properly considered when we speak generally of the reference to the Master.

in equity. (*a*) It was, however, sparingly done;—it was refused in a case where a witness to a bond was confined by sickness; the Court preferring to leave matters to their usual course, namely, proof of the handwriting in case the witness should continue ill at the time of the trial. (*b*) But the stat. 1 Wm. 4, c. 22, enacts, by s. 4, "that it shall be lawful to and "for each of the Courts of Law at Westminster, and also the "Courts of Common Pleas of the County Palatine of Lancaster, "and the Court of Pleas of the County Palatine of Durham, "and the several Judges thereof, in every action depending "in such Court, upon the application of any of the parties to "such suit to order the examination on oath, upon inter- "rogatories or otherwise, before the Master or Prothonotary "of the said Court, or other person or persons to be named in "such order, of any witnesses within the jurisdiction of the "Court where the action shall be depending, or to order "a commission to issue for the examination of witnesses on "oath at any place or places out of their jurisdiction, by "interrogatories or otherwise, and by the same or any subse- "quent order or orders to give all such directions touching "the time, place, and manner of such examination, as well "within the jurisdiction of the Court wherein the action shall "be depending as without, and all other matters and circum- "stances connected with such examinations, as may appear "reasonable and just." And by s. 8, the person taking such examination is "required to make, if need be, a special report "to the Court touching such examination, and the conduct or "absence of any witness or other person thereon or relating "thereto;" &c.

St. 1 Wm. 4, c. 22, as to India and all colonies, &c.

[93]

The same statute, referring to stat. 13 Geo. 3, c. 63, (which gave a power to the Court of King's Bench to order, by a writ of *mandamus*, depositions to be taken by the Judges of the Courts in India,) extends the provisions of that act to "all colonies, "islands, plantations and places under the dominion of His

(*a*) See 2 Tidd's Prac. 854. [*Et vide* Davis *v.* Lowndes, *ut supra*, p. 121, n. (*d*). On this subject, see also Starkie on Evid., 3rd ed. p. 320.]

(*b*) Jones *v.* Brewer, 4 Taunt. 46.

Stat. 3 G. 3, c. 63.

"Majesty in foreign parts." (*a*) The Court of Chancery received a similar power by stat. 13 Geo. 3, c. 63, sec. 44, but finds its own commissions more convenient for the same purpose. (*b*)

[The depositions taken *de bene esse*, no less than other depositions, are subject to suppression, in case of any sufficient irregularity in their taking. (*c*)]

(*a*) [Where certain accounts had been given in evidence at Madras, (a *mandamus* having been issued by the Court of Queen's Bench, under stat. 13 Geo. 3, c. 63, s. 40, for the examination of witnesses), it was held that, at the trial here, copies could not be received in evidence; Reg. *v.* Douglas, 1 Car. & K. 670; S. C. 2 Dowl. N. S. 416; 7 Jur. 305. As to mode of proceeding at law, under a Judge's order for a commission to examine witnesses abroad, see M'Combie *v.* Nuton, 6 Scott, N. R. 923, and Scott *v.* Vansandau, 8 Jur. 114. As to interrogatories at law, see Steinkeller *v.* Newton, 9 C. & P. 313; S. C. 2 Moo. & R. 372; see also Robinson *v.* Markes, ibid. 375.

(*b*) [As to India, &c., *vide supra*, p. 115, n. (*b*), and p. 116, n. (*h*).]

(*c*) [*Vide infra*, P. II. ch. 1.]

[COMMISSIONS EXECUTED IN SCOTLAND OR IRELAND.]

[Part of the stat. 6 & 7 Vict. c. 82, "For amending the Law relating to Commissions for the examination of witnesses," (*a*) is as follows:—

Means of compelling persons to attend and be examined and produce documents.

s. 5. "And whereas there are at present no means of compelling the attendance of persons to be examined under any commission for the examination of witnesses, issued by the Courts of Law or Equity in England or Ireland, or by the Courts of Law in Scotland, to be executed in a part of the Realm subject to different laws from that in which such commissions are issued, and great inconvenience may arise by reason thereof; be it therefore enacted,—That if any person, after having been served with a written notice to attend any commissioner or commissioners appointed to execute any such commission for the examination of witnesses as aforesaid, (such notice being signed by the commissioner or commissioners, and specifying the time and place of attendance,) shall refuse or fail to appear and be examined under such commission, such refusal or failure to appear shall be certified by such commissioner or commissioners, and it shall be, thereupon competent, to or on behalf of any party suing out such commission, to apply to any of the superior Courts of Law, in that part of the Kingdom within which such commission is to be executed, or any of the Judges of such Courts, for a Rule or Order to compel the person or persons so refusing or failing as aforesaid, to appear before such commissioner or commissioners, and to be examined under such commission, and it shall be lawful for the Court or Judge to whom such application shall be made by Rule or Order to command the attendance and examination of any person to be named, or the production of any writings or documents to be mentioned, in such Rule or Order."

(*a*) [The remaining part of this statute will be found below, P. III. ch. VII. As to Affidavits, to which that part more particularly relates.]

Pains and penalties on default.

s. 6. "That upon the service of such Rule or Order upon the person named therein, if he or she shall not appear before such commissioner or commissioners as aforesaid for examination, or to produce the writings or documents mentioned in such Rule or Order, the disobedience to such Rule or Order shall, if the same shall happen in England or in Ireland, render the person disobeying subject to and liable to such pains and penalties as he or she would be subject and liable to by reason of disobedience to a writ of *subpœnâ* in England or Ireland, (*a*) and if such disobedience shall happen in Scotland it shall be competent to the Lord Ordinary on the bills, upon an application made to him by or on behalf of any party suing out such commission, and upon proof of such disobedience made before him, to direct the issue of Letters of Second Diligence according to the forms of the Law of Scotland, to be used against the person disobeying such Rule or Order."

Conduct money, &c.

s. 7. "Provided always, &c."—"That every person whose attendance shall be so required shall be entitled to the like conduct money and payment of expenses, and for loss of time as for and upon attendance at any trial in a Court of Law; (*b*)

Privilege as to the production of any writing or document.

And that no person shall be compelled to produce under such Rule or Order any writing or document that he or she would not be compellable to produce at a trial, (*c*) nor to attend on

Attendance.

more than two consecutive days, to be named in such Rule or Order." (*d*)]

(*a*) [*Ut vide supra*, p. 101-2.]

(*b*) [*Ut vide supra*, p. 101, n. (*e*).

It does not appear whether the person would, during such examination, be protected from arrest; as to which, *vide supra*, p. 64, n. (*b*).]

(*c*) [*Ut vide supra*, p. 64, n. (*a*).]

(*d*) [*Et vide supra*, p. 64, *et* p. 104.]

NEW COMMISSIONS, OR ADDITIONAL COMMISSIONS.

Old practice.

By an Order of 13 Car. 2, May, 1661, Clarendon, C. "He at whose instance a commission to examine after a former commission executed and returned is once renewed, and he by whose default, or by the default of his commissioners, a former commission was not executed, and thereupon it is renewed, shall, at his peril, examine all his witnesses by that renewed commission, or examine them in Court, by the end of the Term wherein the renewed commission is returnable, without any more or further delay." (*a*)

(*a*) [Sand. Ord. 304.

As to commissions prior to the Orders of May, 1845. *Feme sole*, having sued out a commission to examine witnesses, marries before any were examined; the commission not thereby abated or discharged, but the deposition ordered to stand; Winter *v.* Dancie, Tothill. 99. A commission having been granted to examine witnesses at Algiers, the plaintiff died, by which, in strictness, the suit abated; but the witnesses having been examined there, before notice of the death, the examination was held to be regular, though one witness still living; Thompson's case, 3 P. W. 195.

A commission to examine abroad having been executed and returned, the defendant (who had not his interrogatories prepared) not having had the opportunity of cross-examining, a new commission was granted for that purpose, the defendant to state whom he wishes to undertake to cross-examine; but the plaintiff's depositions not suppressed; Campbell *v.* Scougall, 19 Ves. 452. Where a party had a commissioner present upon the first examination, he must not examine upon new interrogatories, by another commission, as to the merits of the cause; Richardson *v.* Lowther, 1 Ch. Ca. 274. A defendant who has joined in commission cannot obtain a new commission except upon a special application, and with notice; Bond *v.* Bond, 4 Sim. 518, and in Ireland, see O'Keefe's Ed. Ord., Ch. Ir. 24. A bill to perpetuate testimony (as to a *modus*) having been amended, by adding an essential party, after the commission was executed, but before publication, a new commission was granted; Biddeford *v.* Partridge, 3 Anst. 646. In a commission obtained by the defendant, the plaintiff joined and named commissioners; the plaintiff afterwards, with leave of the Court, withdrew his replication, and amended the bill; an answer was put in and replication filed thereto, and then the commission re-sealed; it was held to be not necessary to issue a new commission, and that if the commissioners were now unable to attend, they ought to make a special application: and a motion by the plaintiff to discharge the commission for irregularity was refused with costs; Page *v.* Fletcher, Yo. 271. See also, as to New Commissions, Carey, 91, 111, and 112, Richardson *v.* Lowther, 1 Ch. Ca. 273; Minevo *v.* Row, Dick. 18; Coventry *v.* C. Ibid. 25; Rainsby *v.* Power, Dick. 793, 3 Atk. 593; Turbot *v.* ——, 8 Ves. 315, Anon. 1 Vern. 334; Jessup *v.* Duport, Burn. 192.

Depositions under a commission having been suppressed with costs, the payment of those costs was made a condition for granting a new commission; Chamean *v.* Riley, 6 Beav. 419, citing Onge *v.* Truelock, 2 Moll. 41.]

New practice, as to new commissions;

As to *new* commissions: By an Order of May, 1845, No. 102, "If any solicitor, (*a*) having the carriage of a commission, does not within six days after the date of the Master's certificate (*b*) obtain the commission, and duly deliver the same to the commissioner by whom the same is to be executed, any other party entitled to examine witnesses may apply to the Master for leave to take out a new commission, directed to the same commissioners, and to have the carriage of such commission; and the costs of such application are to be paid by the party in default, whether the application succeeds or not." (*c*)

as to any additional commissions.

And as to an *additional* commission: By Order of May, 1845, No. 100. "If any party, entitled to examine witnesses in a cause, shall desire to have any additional commission or commissions, application is to be made to the Master, for leave to sue out such additional commission or commissions; and upon the Master's certificate that such additional commission or commissions is or are proper to be issued, the same may be sued out in the same manner as a first or only commission; (*d*) and in case the parties do not agree, any question respecting the commissioners to be named, or the order in which they are to be named in the commission, or any question respecting the carriage of any such additional commission, is to be settled by the Master, as in the case of a first or only commission." (*e*)

[The course of proceedings on new or additional commissions is, of course, precisely similar to that on a first or only commission. (*f*)]

(*a*) [*Semble*, the words "of the party" are here to be understood.]

(*b*) [As to which see Order, No. 101, *ut supra*, p. 97.]

(*c*) [Sand. Ord. 1013, *ut supra*, p. 97, of commissions generally.]

(*d*) [As to first or only commissions, *vide supra*, p. 94, *et seq.*]

(*e*) [Sand. Ord. 1012.]

(*f*) [*Ut supra*, p. 97, *et seq.*]

[EXAMINATION OF WITNESSES IN PERPETUAM REI MEMORIAM;]

[*Or, to perpetuate the Testimony of Witnesses (in certain cases) against that time when such Testimony may be required as Evidence.*]

[As this part of our subject does not seem to have been very fully treated of in the books of practice, (*a*) it may be as well to trace it down from a somewhat early period; at least so far as Orders of the Court of Chancery refer to it.

Auncient order.

An Order of the Court, in 3 & 4 Phil. & Mary, of the 12th of Nov., 1556, is as follows:—

Examinacion of witnesses in a perpetual memorye.

"WHEREAS heretofore there hath been sundry restrayntes mad by the Lords Chancellors of Englande for the tyme beinge for the examinacion of witnesses in a perpetual memorye upon causes them movinge by vertue of a writ of *dedimus potestatem* issuing out of the Courte of Chancerye yet nevertheles the examyners of the same Courte were never restrayned for the examynacion in their offices whereunto they be sworn in that behalf untell now in Easter Terme laste paste IT IS THEREFORE NOW ORDERED that from hensfourth the partie that requireth to have witnesses examyned in that behalf shall frame a bill conteyninge the cause whie he wolde have such witnesses examyned and thereupon shall sue out the Kinge and Quene's writt for that purpose ordeyned and deliver the same to the partie that it doth or may concerne whereby he maye have notice to have the same or any other witnesses as examined on his behalf

The Teanor of the Writt

The writt.

Rex et Regina &c Johanni Astile Salutem Quia Johannes At Noke Exhibuit coram nobis in cancellariâ nostra quandem peticionem cum quibuzdam interrogatorijs eidem annexis ut quosdam testes ibidem in perpetuam rei memoriam versus

(*a*) [As to this subject, see, however, Pan. Ch. Pr. by H. Ch. 20, p. 3, s. 5, p. 909. Of the examination of witnesses, *de bene esse*. As to which, *vide supra*. And the elaborate compilation of Mr. Spence, Q. C., on the Equitable Jurisdiction of the Court of Chancery, in Pt. II.; Bk. 3, ch. 23, s. 2, p. 680, on the Preservation of Testimony, will furnish the reader with the antiquarian part of this subject.]

te ibidem examinari possit et ne id tibi in prejudicium cederit Tibi præcipimus firmiter injungentes ut omnibus alijs prætermissis at excusacione quâcumque cessante in propriâ personâ tuâ vel per tuum attornatum aut deputatum sis coram nobis in dicta Cancellariâ nostrâ immediate post recepcionem hujus brevis si tibi ita visum fuerit ut et tu dictos testes, aut alios quoscunque ex parte tuâ ibidem similiter examinari possis si velis Teste &c

The order for the xaminers to procede.

John Astile Plaintiff (*a*)
John Atnoke Defendant } Forasmouch as the plaintiff or A B for him hath made an affidavit that he hath delivered the Kinge and Queenes writt to John Atnoke whereby the said John Atnoke hath knoledge that the said John Astile hath exhibited a bill with interrogatories into this Courte of Chancery to have witnesses examined in perpetuall memorie Therefore the xaminers of the same Courte may ordinarilye procede to the examynation of the said witnesses

Per speciale mandatum Domini Cancellarij." (*b*)

Bill to be filed.

A bill, therefore, must now be filed, prior to any application to the Court, with a view to perpetuate the testimony of witnesses; as to matters which though not yet in litigation, are likely to be so, if no such precaution should be taken. (*c*)

Form of bill.

To quote the words of the learned author of the Treatise on Pleading in Equity. (*d*) "A bill to perpetuate the testimony of witnesses must state the matter touching which the plaintiff is desirous of giving evidence, and must shew that he has some interest in the subject, and pray leave to examine witnesses touching the matter so stated, to the end that their testimony may be preserved and perpetuated." (*e*)

Allegations, as to matter, and interest of plaintiff;

that facts cannot be immediately investigated, in a Court of law;

or danger of

"The bill ought also to shew that the facts, to which the testimony of the witnesses, proposed to be examined, is conceived to relate, cannot be immediately investigated in a Court of law;" (*f*) "or that, before the facts can be investigated in a

(*a*) [As Mr. Sanders, in a note, observes, there is a confusion in these fictitious names in the form. It would seem by the tenor of the writ John Atnoke is plaintiff.]

(*b*) [Sand. Ord 14-15.]

(*c*) [See also, to this effect, the Order of Lord Bacon, *infra*, p. 133.]

(*d*) Mitford's Pl. in Ch., 4th ed., by Jeremy, p. 51, *et seq.*]

(*e*) [Thus far the bill was properly drawn in Angell *v.* Angell, 1 S. & S. 83; *sed vide infra.*]

(*f*) [But in this respect the bill lastly referred to, was held to be somewhat defective.]

Court of law, the evidence of a material witness is likely to be lost, by his death or departure from the realm." (*a*) "To avoid objections to such a bill, framed on the last mentioned ground only, it seems proper to annex to it an affidavit of the circumstances by which the evidence is in danger of being lost." (*b*)

loss of evidence.

Affidavit to be annexed to the bill.

It seems to be a further requisite to a bill of this kind that it should state that the defendant has, or that he pretends to have, or at least that he claims, a right to contest, or an interest in contesting, the title of the plaintiff, in the subject to which the proposed testimony relates. (*c*)

Allegation of defendant's right, or claim of right, to contest the title of the plaintiff.

As every bill is, (or at least may be,) wholly or in part, a bill for discovery and relief (*d*), a bill to perpetuate testimony may take the ordinary shape (*e*), and require, in order to obtain the chief object in view, all the steps usually preliminary to a decree on a bill for any other relief: such as pleading, evidence, hearing, inquiries, &c.

Proceedings on a bill to perpetuate testimony.

The form of the prayer to such a bill is usually—"That the plaintiff may be allowed to examine his witnesses, with respect to, &c.," (setting out if need be, the particular matters, or referring to them only, as "the several matters and things hereinbefore mentioned, and particularly, &c.") "so that the testimony of the said witness may be preserved and perpetuated," (adding) "and that the plaintiff may be at liberty, on all future occasions, to read and make use of the same as he shall be advised." In particular cases, the prayer may commence with the usual form "That the said defendants may answer the premises," this however is only when discovery is sought; which it must be, if at all, in like manner and on like grounds as in other bills, by the necessary and proper statements and charges, and formal interrogatories based upon them, and numbered, and so forth. (*f*)

Form of the prayer to such a bill.

(*a*) [But this latter case, of immediate necessity, may co-exist with the former, and render examination *de bene esse* also necessary, as in Frere *v.* Green, 19 Ves. 319; and see Dan. Ch. Pr. by H. 910.

(*b*) [The want of this is fatal; Angell *v.* Angell, *ut supra*. See also, as to the affidavit, Mitf. Pl. in Ch. *ut supra*, pp. 150-1.]

(*c*) [See Mitf. Pl. in Ch. *ut supra*, pp. 51-2-3, and the authorities in the notes; also Van Heythuysen's Eq. Dr. 310-11, Dan. Pr. Ch. by H. 909, Angell *v.* Angell, 1 S. & S. 83, and cases there cited.]

(*d*) [Mitf. Pl. in Ch. *ut supra*, p. 53.]

(*e*) [See the form in Van Heythuysen, Eq. Dr. 715; but see Angell *v.* Angell, 1 S. & S. 93.]

(*f*) [See forms in the Eq. Dr. *ut supra*; and the remarks of the V. C. of England, in Angell *v.* Angell, 1 S. & S. 93.]

No hearing in general.

As other relief however is not usually prayed, the suit is generally terminated by the mere examination of the witnesses, (*a*) and not brought to a hearing at all.

Examination of witnesses, as in other suits.

It will be seen, therefore, that the witnesses will have to be examined either in Court (*i. e.* before the Examiner,) or by commission in the country, according to the particular circumstances, as respects the witnesses, as in any other suit; and that, should the circumstances require it, witnesses may have to be examined *de bene esse* (of which above); and a commission may have to be issued to examine witnesses abroad. (*b*)

Another old order.

Special clauses in commissions.

An Order, in 3 Eliz., of the 10th of Dec. 1560, Sir Nicholas Bacon, Keeper, directs, "Special clauses to be contayned in all commissions graunted *in perpetuam rei memoriam*, or to be annexed to the same," viz.:

Witnesses aged or impotent.

"First. The commissioners shall examyne noe witnesses but such as be aged or impotent. (*c*)

Warning to the other side,

2. Item. The plaintiff or partie that sueth forth the commission shall give warning, by precept from the commissioners, unto the partie that shall take prejudice by this examynacion, by

of the tyme and place,

the space of xiv daies at the least of the tyme and place where and when the commissioners will sytt upon this commission

to be first certefied.

and the same warning being so given to be certefied unto the commissioners by othe of the parties or by othe of some credible person before they shall procede to the examynacion of the witnesses.

If good cause of exception shewn,

3. Item. If the said partie adversaunt can shew before [the commissioners, *qu.* (*d*)] good cause of excepcion either against the witnesses [produced by, *qu.*] the plaintiff or any of them, or against the commissioners themselves [or, *qu.*] otherwise. Then

commission to cease

to surcesse the execution of the commission. Which causes and excepcions shall be certefied up, with the commission.

(*a*) [Morrison *v.* Arnold, 19 Ves. 671, *et vide*, Mitf. Pl. in Ch., *ut supra*; except there be discovery sought, and on that, or any other point, demurrer, or plea, or an answer negativing the facts, may occasion the necessity for a hearing.]

(*b*) [This was the case in Angell *v.* Angell, cited above; but in such cases the Court seems the more jealous, for the reasons alleged by the V. C., 1 S. & S. 91.]

(*c*) [Examination *de bene esse* is the case here provided for.]

(*d*) ["The words inclosed in brackets are merely added by conjecture; the original words being lost, in consequence of the mutilation of the page;" see Sand. Ord. Ch., p. 25, note by Mr. S.]

4. Item. If the said partie adversaunt cannot shewe sufficient cause as ys aforesaid then the commissioners to proceed to examynacion, and the said defendant to have libertie to joine in the examynation of the same witnesses, or of anye other likewise uppon interrogatories on his behalf if he thinke good.

If not shewn commissioners to proceed.

Defendant may join in examination.

5. Item. The commissioners to certifie in their returne such excepcions as the defendant shall take against the proceedings in the same commission and whether the defendant did appear and if not then whether the affidavit was made by or for the plaintiffe that the precepts were served." (*a*)

Commissioners to certefy any exceptions; appearance of defendant, or affidavit of service.

By an Order, in 16 Jac. I., of the 29th of Jan. 1618-19, Bacon, C., (amongst other orders, as to commissions, &c.) No. 73, "Witnesses shall not be examined *in perpetuam rei memoriam*, except it be upon the ground of a bill first put in, and answer thereunto made; (*b*) and the defendant or his attorney made acquainted with the names of the witnesses that the plaintiff would have examined, and so publication to be of such witnesses; with this restraint, nevertheless, that no benefit shall be taken of the depositions of such witnesses, in case they may be brought (*c*) *vivâ voce* upon the triall; but only to be used in case of death before the trial, or age, or impotency, or absence out of the realm at the trial. (*d*)

Order 1618-19, Bacon, C.

Witnesses not to be examined in &c., but on bill filed and answer put in.

What witnesses.

Publication only of the depositions of witnesses,

dead, aged, impotent, or absent.

It seems that formerly it was the practice to set down a cause of this kind for hearing; but an Order, made in *Bossville* v. *Bossville*, 22 Car. II., 9th Nov. 1670, Bridgeman, K., runs thus: "This cause coming on to be heard" &c., "counsel now (as to one point only) desiring to be relieved and that the depositions might be exemplified so as the plaintiff might have the benefit of them at all times as occasion should require which the plaintiff could not have had without setting down his cause according to a late Rule made on that behalf," (but which Rule, however, Mr. Sanders says, in a note to his Orders, p. 335,

Old rule, as to the setting down the cause, referred to in *Bossville* v. *Bossville*;

but not now extant.

(*a*) [Sand. Ord. 24-5, and note, *ut supra*, p. 132, n. (*d*). The rest of this old Order, *vide infra*, Publication.]

(*b*) [But, on the authority of Coveney *v.* Athill, 1 Dick. 355, leave to sue out a commission was given, before answer, where the defendant had been attached and still refused to answer, in Lancaster *v.* Lancaster, 6 Sim. 439.]

(*c*) [The words "to testify" seem wanting, *sed sic in orig.* Sand. Ord. 118.]

(*d*) [Sand. Ord. 118-19. As to the publication of the depositions, here alluded to, *vide infra*, Publication.]

Newer rule.

he had not been able to find any entry of,) "for establishing a certain rule herein for the future, the Court ordered that "When bills of this nature" (it was of that mixed kind alluded to above, p. 131) "are brought to preserve testimony of witnesses, the plaintiff in such case shall not be forced to set down his cause but shall give notice in writing to the other side that he will move the Court and only insist to have the depositions of witnesses exemplified. And on motion in Court without the formalitie of setting down the cause and serving the defendant to heare judgment such order shall be given for the plaintiffs relief in such cases as shall be just." (*a*)

Plaintiff not forced to set down his cause; but may, on notice, move that the depositions may be exemplified.

Present practice.

It seems that upon this old Rule, thus altered, the course of proceeding without coming to any hearing, as alluded to by Mr. Mitford, in the passage quoted above, (*b*) has ever since continued; even with respect to bills of a mixed nature, where the plaintiff will waive the other relief. Indeed, bills to perpetuate the testimony of witnesses are classed amongst bills not praying relief. (*c*)

Stat. 5 & 6 Vict. c. 69; as to the perpetuating testimony, in certain cases.

An Act for perpetuating Testimony in certain Cases, viz. the stat. 5 & 6 Vict. c. 69, has greatly augmented the importance, and probably facilitated the use, of this power of the Court. The Act is as follows:—

Sect. 1, "Whereas it is expedient to extend the means of perpetuating testimony in certain cases: be it enacted, &c." "That any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled, from and after the passing of this act, to file a bill in the High Court of Chancery

Bills in Chancery to perpetuate testimony may be filed by persons claiming honours, titles, &c., contingent on future events.

(*a*) [Sand. Ord. 335-6. Mr. Sanders adds, that the above order was soon afterwards acted upon in Dove *v.* Dove; and he adds also the form of the order so made.]

(*b*) [Mitf. Pl. in Ch., *ut supra*, p. 51, n. (*u*).]

(*c*) [In Mitf. Pl. in Ch., p. 51. To rectify certain abuses, alleged to exist, as to the making out of (amongst other things) "writts to examine witnesses in perpetuall memory," an order was made by William Lenthall, (called) the Right Honourable the Lord Speaker of the Parliament and Keeper of the Great Seal, in anno 1659; which see, in Sand. Ord. 286-7. But now, as to writs of *subpœna*, &c., *vide supra*, p. 53, n. (*d*).]

to perpetuate any testimony which may be material for establishing such claim or right; and that all laws, rules, and regulations not contrary to the provisions of this act, now in force or in use in suits to perpetuate testimony, or respecting depositions taken in such suits, or the punishment of perjury committed in making such depositions, shall be in force and used and applied in all suits to be instituted under the authority of this act, and in respect to depositions taken on such suits.

Attorney general to be party defendant in all such suits in which the Crown may have any estate or interest.

Sect. 2, "And be it further enacted, that in all suits which may be so instituted under the authority of this act, touching any honour, title, dignity, or office, or any other matter or thing, in which her Majesty, her heirs or successors, may have any estate or interest, it shall be lawful to make the Attorney General for the time being a party defendant thereto; and that in all proceedings in which the depositions taken in any such suit in which the Attorney General for the time being was so made a defendant may be offered in evidence, such depositions may be admissible notwithstanding any objection to such depositions upon the ground that her Majesty, her heirs or successors, were not parties to the suit in which such depositions were taken." (*a*)

When such a suit proper.

The circumstances under which the Court will exercise this power, of perpetuating testimony, are mentioned by the learned author of the Treatise on Pleadings in Chancery, when treating of the cases in which a Court of Equity assumes jurisdiction, to preserve testimony. (*b*)

(*a*) [As to perpetuating testimony with regard to the right to peerages and titles of honour, see also the Townshend Peerage Case, 10 Cl. & Fin. 280.]

(*b*) [Mitf. Pl. Ch., chap. 2, sect. 2; Pt. 1, § 10, 4th ed. by Jeremy, p. 148, *et seq.* where, *in notis*, see cases collected by the editor.

In a suit to perpetuate the testimony of the witnesses to a will, if the heir examine witnesses of his own in chief, he will not be allowed his costs of so doing; Berney *v.* Eyre, 3 Atk. 387; Vaughan *v.* Fitzgerald, 1 Sch. & Lef. 316. For other cases wherein examination *in perpetuam rei memoriam* has been granted, see Porter *v.* Baker, Carey, 16; Hatcham *v.* Winchcombe, ibid. 34; Bagshaw *v.* ——, ibid. 35; Robins *v.* Foster, ibid. 26, n.; Wade *v.* George, ibid. 40; Barrat *v.* Hubert, ibid. 43; Hearing *v.* Fisher, ibid. 110; James *v.* Newman, Dick. 338; and Angell *v.* Angell, 1 Sim. & Stu. 93. In which last case the more modern cases are collected.

As to the use of depositions taken in a suit to perpetuate testimony, see Att. Gen. *v.* Ray, 2 Hare, 518, cited *infra*, under the head of Publication of such.

It seems to deserve notice, in this place, that an Order, of the 29th of April, 1779, provided for the sorting, entering, and preserving, of many thousands of commissions, theretofore issued, for the examination of witnesses, *de bene esse*, and in chief, which had not been opened, or the depositions taken thereon published. See Sand. Ord. 657-8.]

SECTION IV.

PUBLICATION.

Old practice.

THE Publishing, or making known the contents of depositions, by giving out copies of them to the parties to the suit, [under the old practice] became allowable either at the expiration of eight days after one of the parties had entered at the Six Clerks' Office a rule to pass publication, or at the time fixed by an order which had enlarged publication, or on any day when the parties chose to consent and make an entry to that effect at the Six Clerks' Office. (*a*)

[But the present practice, as to publication, is regulated by the late orders; to which therefore we shall proceed to advert.

New practice.

By an Order of May, 1845, No. 16, "Times allowed in procedure," s. 44. "After the expiration of two months from the filing of the replication publication is to pass, unless the time for publication has been enlarged, in which case it is to pass on the expiration of the enlarged time; but if the two months, or the enlarged time, expire in the Long Vacation, publication is not to pass till the second day of Michaelmas Term; and on that day it is to pass, unless the time has been enlarged." (*b*)

By another of these Orders, No. 111, "Publication is to pass, without rule or order, on the expiration of two months after filing the replication, unless such time expires in the Long Vacation, or is enlarged by order." (*c*)

And by another of these Orders, No. 112, "If the two months after the filing of the replication expire in the Long Vacation, publication is to pass on the second day of the ensuing Michaelmas Term, unless the time is enlarged by order." (*d*)

By another of these Orders, No. 113, "If the time is enlarged by order, publication is to pass, without rule or order, on the expiration of the enlarged time, unless the enlarged time

(*a*) [See Sand. Ord. 303; ibid. 519; ibid. 429; ibid. 505; ibid. 510; and the more recent Orders of 1828, ibid. 717, amended by those of 1831, ibid. 754; also Dan. Ch. Pr. by H. 927. Three weeks after issue joined; see Flight *v* Jones, 7 Sim. 256. Where leave had been given, by decree, to exhibit interrogatories to prove a will of real estate; but the Examiner declined to publish the depositions, an order was made; Rossiter *v.* Pitt, 2 Mad. 165.]

(*b*) [Sand. Ord. 993.]

(*c*) [Sand. Ord. 1017.]

(*d*) [Sand. Ord. 1017.]

expires in the Long Vacation, in which case publication is to pass, without rule or order, on the second day of the ensuing Michaelmas Term, unless the time is further enlarged by order." (*a*)

Prior to these Orders the practice as to enlarging publication had been regulated of late, by the Orders and statutes, we shall now refer to. Enlarging publication.

By an Order of the 23rd of November 1831, No. 18, "Publication shall not be enlarged except upon special (*b*) application to the Court, made upon notice, (*c*) supported by affidavit, (*d*) and at the cost of the party applying, unless otherwise ordered by the Court." (*e*) Special application;

Now the stat. 3 & 4 Wm. 4, c. 94, s. 13, provides that "The Master in Ordinary shall hear and determine all applications for" (amongst other things) "enlarging publication" (*f*)—"and either party may appeal, by motion, from the order made in to the Master, or (on appeal) to the Court;

(*a*) [Sand. Ord. 1017. The Long Vacation being from the 10th day of Aug. to the 28th day of Oct. both inclusive, by another of these Orders, No. 8, ibid. 983.]

(*b*) [This defines it as a special application; but when no witness had been examined it was still a motion of course; French *v.* Lewsay, 6 Mad. 50.]

(*c*) [Before this order no notice was required; see the Order of 3rd April, 1828, No. 18, Sand. Ord. 717, and see Brown *v.* Brown, 1 Russ. & M. 77. A defendant must now serve his co-defendant, as well as the plaintiff, with notice; Brydges *v.* Bramhill, 9 Sim. 603.]

(*d*) [As to affidavits, *vide infra*, P. III. ch. 7.]

(*e*) [Sand. Ord. 754. This Order superseded one of April, 1828, same No., ibid. 717; see also Order, No. 17 of 1828 and 1831, ibid. 717 and 754.]

(*f*) [But the Master being prevented, by illness, from attending his office, on the day appointed for hearing an application to enlarge publication, the application may be made to the Court; Boys *v.* Trapp, 9 Sim. 218. A motion for leave to examine witnesses, and that publication may in the meantime be enlarged, after publication has actually passed, is not an application which comes within the meaning of the stat. 3 & 4 Wm. 4, c. 94, s. 13, but ought to be made to the Court in the first instance; Carr *v.* Appleyard, 1 Keen, 725; S. C. 2 Myl. & Cr. 476. The Masters have no jurisdiction under the 3 & 4 Wm. 4, c. 94, s. 13, to enlarge publication after it has passed; Anon. 5 Beav. 92.

The words "enlarging publication," in the stat. 3 & 4 Wm. 4, c. 94, s. 13, cited above, have been held to be understood in the strict sense of enlarging the time at which publication is to pass; and after the time expired and depositions delivered out on one side, the Master has no jurisdiction to allow witnesses to be examined, for which purpose publication was sought to be enlarged in Carr *v.* Appleyard, 1 Keen, 725, affirmed on appeal, 1 Myl. & Cr. 476. A simple motion to enlarge publication, although involving *no* specialty, ought to be made to the Master, and not to the Court; (considering the cases falling within the intent of 3 & 4 Wm. 4, c. 94, s. 13;) Strickland *v.* Strickland, 4 Beav. 146.

An order for a commission to examine, returnable on a day subsequent to that to which publication stands enlarged, with liberty to apply to the Master to enlarge was held to be irregular; Maund *v.* Allies, 4 Myl. & Cr. 503.]

such application to the Lord Chancellor, Master of the Rolls, or Vice Chancellor, and the order made on such appeal shall be final." And, by sect. 14, it also provides that "No such application be heard by any of the Judges except on appeal." And, by sect. 15, provides as to costs.

Order on such appeal to be final.

As to costs.

Application to the Master;

By an Order of December, 1833, (made under and by virtue of the act lastly referred to,) "All special applications under that act shall be heard and determined by the Master in rotation, and shall be made by taking out a warrant; at the foot whereof a notice shall be written, specifying the object of the application, and the same shall be served two clear days before the return thereof. (*a*)

But after publication, to the Court.

If the two months after replication, or the time referred to in the Orders cited above, have already expired, publication has passed, and any application to enlarge must be made to the Court. (*b*)]

Grounds.

In most cases the [Master or the] Court will enlarge publication, and give a party a further opportunity of examining witnesses even though publication should have been enlarged by a precedent order, if any reasonable ground can be shewn; as where a party's witnesses reside in parts of the kingdom distant from each other, or where the party applying, was not able to examine all his witnesses under a joint commission executed in the cause, some of them residing at a great distance from the party, and others at a great distance from the place of executing the commission; or where witnesses refuse or neglect to attend the execution of the commission, or by any accident have not been examined at the proper time; in any of these [or the like] predicaments (*c*) an affidavit should be made of

[94]

Affidavit.

(*a*) [Sand. Ord. 780.]

(*b*) [*Vide supra*, p. 137, n. (*f*).]

(*c*) [As each case must depend chiefly on its own facts, it may suffice merely to refer to the following cases, where publication has been enlarged under particular circumstances; Winter *v.* Buckley, 2 Pri. 460; Stevens *v.* Solway, 1 M'Clel. 596; Dingle *v.* Roe, Wightw. 99; Moody *v.* Leeming, 1 Mad. 85; although often enlarged before, in Barnes *v.* Abram, 3 Mad. 106; on terms (as to costs), in Cutler *v.* Cremer, 6 Mad. 253; and where it was plain to the adverse party that there was good reason for the application, the costs of appearing and resisting the motion to enlarge were refused; Harrison *v.* Corbould, P. C. 420.

But the plaintiff cannot have publication enlarged, and examine witnesses, after he has set down the cause; Yates *v.* Bolland, Dick. 495. And when the plaintiff having obtained an order to enlarge, before publication passed set down the cause, and issued *subpœnd* to hear

the facts, and that the party has as he is advised, several material witnesses to examine, without whose testimony, he cannot safely proceed to a hearing. (*a*) An application on the foot of this affidavit, should be made, stating that publication passes on such a day, by rule or order, likewise stating the substance of the affidavit before mentioned, and the [Master or the] Court will exercise a discretion upon the case made, and enlarge publication accordingly; indeed [under the old practice] when necessary, the party used to engraft upon an application of this sort, one for liberty to sue out a commission for the examination of witnesses, with leave to execute the same in Term time. Notice in writing of this application, if made by motion, was [under the old practice] served on the adverse clerk in Court personally, or left with his agent, at his seat in the Six Clerks' Office, two days previous to the day whereon the application [was] to be made. (*b*) In all these cases where a party applies for the indulgence of the Court, a provision is always made in favour of the adverse party, such as not to hinder the party from setting down his cause in the mean time; because by the course of the Court publication and hearing are not to be of the same Term unless by consent or special order. (*c*)

Old practice.

Court will put party applying on terms.

[In cases where the defendant to an original bill has filed a cross bill, the question as to the right to enlarge publication will not unfrequently arise. (*d*)]

Where a cross bill is filed.

judgment, it was held to be irregular, the *subpœnâ* quashed, and the cause struck out of the paper; Ellis *v.* King, 4 Mad. 126. When the plaintiff obtains an unconditional order to enlarge publication, the defendant can neither set down the cause, nor serve *subpœnâ* to hear judgment, until the time has expired; this rule having been contravened, an order was made to quash the *subpœnâ*, and to strike the cause out of the paper; Langley *v.* Fisher, 5 Beav. 588. The Court refused to enlarge publication on the application of a party who had taken the depositions of the opposite party out of the office, although by mistake; Lawrell *v.* Titchborne, 2 Cox, 289. After great delay, and the time for publication passed, the solicitor was made to pay the costs of an application to enlarge publication, in White *v.* Hillacre, 3 Yo. & C. 278.]

(*a*) [See Brunt *v.* Wardel, 3 Yo. & C. 503, if the allegations are false the order will be discharged.]

(*b*) From Hinde's Ch. Pr. 383.

[As to the service of the Order, see Dan. Ch. Pr. by H., 932.]

(*c*) Hinde's Ch. Pr. 383, [and see also Sand. Ord. 510, ibid. 505; but as to the terms imposed, prior to the late orders, see Dan. Ch. Pr. by H., 929; (and, as to setting down the cause, Langley *v.* Fisher, 5 Beav. 591:) and it is not then obtainable as of course, see Conethard *v.* Hasted, 3 Mad. 429.]

(*d*) [As we may have occasion to allude to this again, in the Chapter On Evidence allowed on special order, we need only add the following cases.

Where the defendant in a cross-suit, (plaintiff in the original suit) is in contempt for not putting in an answer to the

Motion to enlarge, after publication.

Where publication has actually passed, the Court will still enlarge publication (*a*) if a very special case is made out; but it must be accompanied with an affidavit that the party, his clerk in Court, and solicitor, have not seen or been informed of, and that they will not see or be informed of, the contents of the depositions until the enlarged time of publication. (*b*)

[95] Motion to examine, after publication.

Upon motion for leave to examine after publication, upon making the usual affidavit of not having seen the depositions, the Lord Keeper North declared, that in such a case, the other side should be at liberty to examine at large, as well as to cross-examine the witnesses produced by the party that made the motion, (which was all he might do formerly.) And his reason was that "a crafty solicitor may lie in the lurch, and examine nothing till after publication is passed; and the other party may think himself secure, and so not examine to those points, which he could otherwise have proved, in regard he finds his adversary has not examined to those matters. And

cross-bill, a motion to stay proceedings in the original cause is not the proper one, but application should be made to enlarge publication in the original suit, until a fortnight after the answer to the cross-bill shall have been put in; Creswick *v.* Creswick, 1 Atk. 291, *sed vide infra*. Publication in the cause was enlarged until after appearance to the cross-bill, in Gardiner *v.* Mason, 4 B. C. C. 478.

It is not a motion of course to enlarge publication in an original suit on filing a cross-bill, but notice must be given, &c.; Aylet *v.* Easy, 2 Ves. 336. And so even after answer, it is not of course to enlarge publication until the coming in of the answer to a cross-bill; Dalton *v.* Carr, 16 Ves. 93. Motion to enlarge publication in an original cause until the coming in of the answer to a cross-bill, the original cause being set down for hearing, and the cross-bill filed after rules for passing publication, refused, with costs, in Cook *v.* Bromhead, 16 Ves. 133. After answer put in to the original bill, the Court will not enlarge publication, until the putting in the answer to the cross-bill, but the Court of Exchequer required an affidavit verifying the facts stated in the cross-bill, in Edwards *v.* Morgan, 11 Pri. 399. Where in proceeding on bill and cross-bill, there had been delays on both sides, the Court granted a second order to enlarge publication in the original cause on terms, in order to give the party applying time to consider the matter furnished by the answer to the cross-bill, newly filed, with a view to the application of it in his defence to the original bill, but the defendant was to pay costs; Lowe *v.* Firkins, 13 Pri. 21; S. C. 1 M'Clel. 10, where see the form of the affidavit necessary. Where a defendant after answering filed a cross-bill, which not being answered, an attachment issued, which however was not served the party being resident abroad, but he was proceeding to examine witnesses in the original suit, the Court, on the application of the defendant to the original bill, ordered that publication should not pass, until the answer put in, the contempt cleared, and publication directed by the Court; Palmer *v.* Leycester, 6 Sim. 610.]

(*a*) [See, as to this, Dan. Ch. Pr. by H., p. 931, and the cases there cited. But, as to *after* publication, see the Order of Lord Bacon, cited above, p. 70, n. (*a*), and Sand. Ord. 119.]

(*b*) Whitelocke *v.* Baker, 13 Ves. 512. [In one case indeed (in the time of Lord Somers) the Court enlarged publication, although this rule could not be complied with. But it was a particular case of fraud; see 1 Harr. Newl. ed. 289; this case is set also out, in Dan. Ch. Pr. by H., 931-2.]

when once publication is passed, and the party that examined, has seen his own depositions, and then the side that lay still, having tied up his adversary so that he can only cross-examine the other's witnesses, applies for an order upon the usual affidavit to enlarge publication, and when he has got that order, then he comes in with a whole cloud of witnesses; and though it may be thought hard, that any one should have liberty to examine, after he has seen the depositions, yet his Lordship thought it a reasonable penalty on such as would not examine in time, or that would lie upon the catch to take advantage of the party; and ordered the register to take notice of it as a fixed rule for the future." (*a*)

Depositions *in perpetuam rei memoriam.*

[Publication of depositions taken in a suit *in perpetuam rei memoriam* is necessarily restricted within narrow limits. (*b*)

Old order.

By an Order, in 3 Eliz., of the 10th of Dec. 1560, Sir Nich. Bacon, K., (cited above,) for "Special clauses to be contayned in all commissions granted *in perpetuam rei memoriam*" (this was before filing a bill had been made a necessary preliminary) "or to be annexed to the same," the following were the "Orders to be observed before publicacion graunted," which we give in full, as authoritative explanations of the principles acted upon by the Court.

Clauses in commissions.

Orders to be observed.

"1. The partie that praieth publicacion (*c*) of the witnesses examined as aforesaid (*d*) shall first by himself or some other take othe that the same (*e*) witnessess are necessarilie to be given in evidense on his behalf. (*f*)

Publicacion.

Othe to be taken that evidence is necessary,

(*a*) Anon. 1 Vern. 253. [In general after publication and examination is known, this Court will not give to either side leave to examine; Cann *v.* Cann, 1 P. Wms. 727: so Smith *v.* Turner, 3 P. Wms. 413, and the order *supra*, p 70, n. (*a*). In one case, indeed, plaintiff examined a witness two days after passing publication; defendant cross-examined the witness, and the Court would not suppress the depositions; Hamond *v.* ———, Dick. 50. But, in general, no witness ought to be examined after publication, although sworn before; Hutchinson *v.* Pepys, 3 Anst. 835. A plaintiff by mistake examined witnesses without having filed a replication; leave was given to him, notwithstanding publication had passed, to examine his witnesses again, on the interrogatories already filed, but not to examine new witnesses; Heeley *v.* Jagger, 3 Sim. 494. It may be observed, by the way, that in the Ecclesiastical Court, evidence taken after publication is looked at with the greatest caution, see Young and Smith *v.* Richards, 2 Curt. 374.]

(*b*) [As to this kind of suit, *vide supra*, p 129, *et seq.*]

(*c*) [The words "of the depositions" seem wantiug; *sed sic in orig.*]

(*d*) [The former part of these orders, *vide supra*, p. 132, *et seq.*]

(*e*) [*Vide supra*, n. (*c*).]

(*f*) [This seems similar to the affidavit now required to be annexed to the bill; *vide supra*, p. 131, *et ibid.* n. (*b*).]

and witnesses either dead, or &c.

"2. Item. Othe also to be taken that the same witnesses be either dead or so aged or impotent as they cannot travaill to testify *vivâ voce* without danger of lief. (*a*)

Master to open commission, and see if this order observed.

"3. Item. This othe being taken, a Master of the Chauncery first to open the commission and consider whether this order before written, (*b*) hath been observed in all poynts. And thereupon publicacion to be graunted. Provided that no such deposicions shall be given in evidense, but against the persons that were warned by precept as aforesaid, (*c*) or against their heirs or assignes." (*d*)

No evidence but against persons warned.

Order 1618-19, Bacon, C.

Witnesses not to be examined in &c., but on bill filed, and answer put in.

What witnesses.

Publication only of the depositions of witnesses,

dead, aged, impotent, or absent.

Then by an Order, in 16 Jac. 1, of the 29th of Jan. 1618-19, Bacon, C., No. 73, cited above, "Witnesses shall not be examined *in perpetuam rei memoriam*, except it be upon the ground of a bill first put in, and answer thereunto made, and the defendant or his attorney made acquainted with the names of the witnesses that the plaintiff would have examined; and so publication to be of such witnesses; with this restraint nevertheless, that no benefit shall be taken of the depositions of such witnesses, in case they may be brought (*é*) *vivâ voce* upon the trial, but only to be used in case of death before (*f*) the trial, or age, or impotence, or absence out of the realm at the trial." (*g*)]

Depositions *de bene esse*,

Publication of depositions *de bene esse* is not allowed but

(*a*) [*Vide supra*, p. 141, n. (*f*), *et infra*.]

(*b*) [*Ut supra*, p. 132, *et seq.*]

(*c*) [*Ut supra*, p. 132.]

(*d*) [Sand. Ord. 25.]

(*e*) [The words "to testify" seem wanting; *sed sic in orig.*, Sand. Ord. 118.]

(*f*) [Here and below the words "the time of" seem omitted; but see last note.]

(*g*) [Sand. Ord. 118-19, see also the Order for publication and exemplification in Dove *v.* Dove, Sand. Ord. 336, n. Senhouse *v.* ——, Cary, 88; *et* ibid. 38 *et* 35. As to publication of such depositions in the Chancery of Ireland, see Green *v.* Green, 1 Hog. 312. That such are not published whilst the witnesses are alive, see Barnsdale *v.* Lowe, 2 Russ. & M. 142; Morrison *v.* Arnold, 19 Ves. 671, *ut infra*. And generally, the publication of such depositions should only be allowed in a strong case; Harris *v.* Cotterell, 3 Mer. 678. But publication of the depositions of a witness, who is dead, may be moved for, as of course; Bourne *v.* Bligh, 1 Pri. 307. And so on incapacity to travel, by sickness, &c.: such orders are made on affidavit of the death of the witness, &c. And some expressly declare that the depositions of the other witnesses shall not be read; Morrison *v.* Arnold, 19 Ves. 670. Even when the witness is dead, the Court will not order copies of his depositions to be delivered out merely for the purpose of perfecting the title to an estate; Teale *v.* Teale, 1 S. & S. 385, *et vide infra*.

When depositions, taken in a suit to perpetuate testimony, are required to be used in a trial at law, not under the control of the Court, the order is,—that the depositions be published, and that the officer attend with, and produce to the Court of Law, the record of the whole proceedings, and that the parties may make such use of the same as by law they can; Att. Gen. *v.* Ray, 2 Hare, 518.]

where there is a moral impossibility to have the examination in chief. It depends upon circumstances whether the witness being abroad is sufficient, if it be possible to get at him. (*a*) Lord Hardwicke gives as the common instances, the witness dying, or going to a great distance; he admits as a sufficient moral impossibility the case before him, in which a commission having been granted into Sweden, the King there refused to allow it to be proceeded with, except in his own Courts and according to Swedish law. The Lord Chancellor would have gone great lengths, he said, to have received evidence so given but the examination having been open, it was impossible; and as the commission had been returned, he was unwilling to send another, to be treated as that had been; he therefore made, as he says, "the common order, which is made on petition and affidavit of a witness being dead: which was only, that when publication should pass in the cause, the depositions which had been taken *de bene esse*, should be published." (*b*)

when published. Witness abroad; where no commission could be executed.

[96]

Common order; when witness dead.

To avoid publication unnecessarily, where the witness was not expected to be well enough to attend a trial at law, the officer in whose custody the depositions were, was ordered to attend with them at the trial, and if it should then be proved to the satisfaction of the Court that the witness could not possibly appear, resort was to be had to the depositions. (*c*) When a witness swore

When witness may be able to attend at a trial.

When witness

(*a*) See Birt *v.* White, Dick. 473. [And it is worthy of notice that under the older order, cited above, such was the rule as to witnesses in a suit to perpetuate testimony; *vide supra*, p. 142, *et* Sand. Ord. 25; but Lord Bacon's Order, also cited above, relaxed this rule in that respect; *vide supra*, p. 142, *et* Sand. Ord. 119.]

(*b*) Gason *v.* Wordsworth, 2 Ves. 337, and Ambl. 108. The order is usually made of course on a motion with a proper affidavit; Hamilton D. of, *v.* ——, 2 Ves. 497. [Depositions taken *de bene esse*, the witness dead allowed to be published, to be used at law; Price *v.* Bridgeman, Dick. 144; the witness become incompetent (by interest); Brown *v.* Granby, ibid. 504; see also Ward *v.* Sythes, Ridgw. 193; O'Hara *v.* O'Hara, 1 Hog. 284; and where published after many years; Hamilton *v.* Meynall, Dick. 788.

In the Chancery of Ireland, publication of depositions taken *de bene esse*, was refused after a trial had, on which some of the persons who had been examined *de bene esse*, and who had since died, were examined, and tho other might have been in Fitzpatrick *v.* Webb, 2 Moll. 313.]

(*c*) Andrews *v.* Palmer, 1 Ves. & Bea. 22. [And the practice of the civil law Courts is similar. A witness in imminent danger of death having been examined *de bene esse*; if living, and capable of being examined, at the hearing of the cause, such examinations are inadmissible; Weguelin *v.* Weguelin, 2 Curt. (Cons.) 263. At law, in order to let in the depositions of a witness examined on interrogatories (*i. e. de bene esse*), his absence (at least) must be shown, by some one who can speak to the fact of his own knowledge; proof of inquiries made at the residence of the witness and of the answers given is not enough; Robinson *v.* Markes, 2 Moo. & R. 375, *et vide supra*, p. 142, n. (*g*).]

does attend, and is examined in chief.

in a trial at law differently from his depositions *de bene esse*, an application was made for publication of his evidence in order to confront him with it at a new trial; upon the first blush Lord Bathurst, C., granted the order, but on serious consideration and deliberation, and before the order was delivered out he altered his opinion and refused it. (*a*) When a defendant "having reason to believe that the witnesses when examined *de bene esse* did not swear so fully as they had been prevailed upon to do when examined in chief, petitioned the Lord C. (Macclesfield) that these depositions *de bene esse* might be published, or at least that his Lordship would be pleased to order them to be brought before him for his inspection," he refused the first part of the request as unprecedented, and the second part on the ground that he ought not to form a judgment on secret evidence: He said, "It is true Lord Somers and Lord Cowper did order copies to be brought to them to inspect, but that was for enabling them the better to judge whether the plaintiff in those causes, after so long time elapsed since the commencement of them, and so many transactions in them, should be allowed, after the plea, to proceed to a hearing." (*b*)

[97]

Distinction, with respect to publication, between the depositions taken on an examination of witnesses *de bene esse*, —in a suit to prove a will *per testes*,— and in one for an examination of witnesses, *in perpetuam rei memoriam*.

In a case in the Exchequer, "Graham, B., said that great confusion has arisen, with respect to publication, between three distinct objects: first, examinations *de bene esse;* secondly on a bill merely to prove a will *per testes;* and thirdly, examinations of witnesses on bills *in perpetuam rei memoriam* which obtain on wills and deeds, on moduses, on legitimacy of marriage, &c. (*c*) As to the first, they are not published but by consent or on a strong case being made. As to the second, they stand on a distinct ground, because none but the subscribing witnesses are examined, and they are examined, as to the question of sanity merely as incidental; and there, publica-

(*a*) Pegge *v.* Burnell, reported in Hinde's Ch. Pr. 390.

(*b*) Cann *v.* Cann, 1 P. Wms. 569. [As to examinations *ad informandum conscientiam judicis*, see the Orders of 1619, Bacon, C., No. 74; Sand. Ord. 119, *et supra*, p. 70, n. (*a*).]

(*c*) [The examination of witnesses *in perpetuam rei memoriam* does not differ from the common examination. The suit itself, of which it is the sole end and object, has some few peculiar incidents in the pleadings, &c. which are treated of in Mitf. on Pl., 4th ed., 51, *et seq.* and p. 148, *et seq.*; 1 Mad. Ch. Pr. 185; *et vide supra*, p. 129, *et seq.*, and see some cases collected in 1 S. & S. 93, note.]

tion is of course.(*a*) But, as to the third, he thought none of the cases or dicta applied to it, and that if publication had been usually allowed, it was *sub silentio*, and the question never discussed."(*b*) The Court took time to consider of the last mentioned point, and after having consulted with the Lord Chancellor, refused publication.(*c*) Since that case it has even been refused where for want of it a title could not be made for a purchaser.(*d*) The only excepted cases are where the witness has been sick or otherwise incapable of travelling.(*e*)

Depositions irregularly published.

If depositions *de bene esse* have been published irregularly, the proper course is not to move that they may be suppressed, nor to object to them at the hearing, but to move to discharge the order for their publication.(*f*)

Examination after decree.

[Of the publication of depositions of witnesses examined after the decree, we shall have occasion to treat in another part of this work.(*g*)]

[THE CAUSE SET DOWN FOR HEARING.]

Four weeks after publication.

[By an Order of May, 1845, No. 16, Times allowed in procedure, s. 45, "Within four weeks after publication has passed, the plaintiff is to set down his cause, and obtain and serve a *subpœna* to hear judgment."(*h*)

Subpœna to hear judgment.

By s. 46 of the same Order, "a *subpœna* to hear judgment is not to be returnable at any time less than one month from the *teste* of the writ; and it is to be served at least ten days before the return thereof."(*i*)]

(*a*) [As in Rossiter *v.* Pitt, 2 Mad. 165, cited above.]

(*b*) [But see the several cases cited above, p. 142, n. (*g*), and those referred to in them.]

(*c*) Harris *v.* Cottrell, 3 Mer. 678.

(*d*) Morrison *v.* Arnold, 19 Ves. 670; 2 Russ. & M. 145; Teale *v.* Teale, 1 S. & S. 385; and see Barnsdale *v.* Lowe, 2 Russ. & M. 142, where one case of exception, Berkeley *v.* Berkeley, or Dursley *v.* Fitzharding, is quoted and commented upon.

(*e*) Morrison *v.* Arnold, 19 Ves. 674. [But see the principles enunciated, *supra*, p. 142-3. And, for old cases, see Spence's Eq. Jur. Ch., p. 681, n. (*d*).]

(*f*) Dean and Chapter of Ely *v.* Warren, 2 Atk. 189. [As to suppression and objections at the hearing, *vide infra*.]

(*g*) [*Infra*, Pt. III. c. 5, § 2. And see Hindly *v.* Billinge, 1 Sim. 511; Winpenny *v.* Courtney, 5 Sim. 554.]

(*h*) [Sand. Ord. 993. But, of course, a suit to perpetuate testimony only is an exception.]

(*i*) [Sand. Ord. 993.]

SECTION V.

EXHIBITS.

What may be such.

THIS is the designation given to [documents and] writings of any kind, that are proved in a cause, either by admission or by witnesses. (*a*) Certain classes of documentary [and other] evidence of which the Court will take judicial notice, as the Public Statutes, &c. will be left to a future chapter. (*b*)

Exhibits form so peculiar and important a branch of the evidence produced by witnesses, that it will be convenient to treat of them under a separate head before we proceed farther; and they vary so much, both in the manner, and in the means, of proof, that it will be necessary for us to go considerably into detail.

Proof of such;

With regard to the manner of proof.

Any exhibits [not admitted (*c*)] may be proved, in the regular way, before the examiner or commissioners, by interrogatories, in such common forms as [*e. g.*] the following, viz.

by interrogatories,

"Look upon the deeds or writings produced and shown to you "at the time of this your examination, [and] marked respectively "with the letters (A.,) (B.,) &c.; [Whether or no] were or was "the same or any and which of them at [or about] any and what "times or time, signed, sealed, and delivered [or signed] by "any and what persons or person in your presence," &c. (*d*)

vivâ voce, at the hearing,

Some exhibits may be proved in another manner, which is often found more convenient, and of which we shall speak in the next section, namely by *vivâ voce* testimony, at the hearing of the cause.

(*a*) The word [Exhibits] is often restricted to that kind of writings which may be proved *vivâ voce* at the hearing; see the following section. [But maps, plans, drawing, models, and even samples of things which are the subjects of litigation, and the things themselves, when convenient for inspection, may be proved and used as Exhibits; as, *e. g.*, in any of the many cases of applications for an injunction. And, as to Inspection in aid of proof, in such cases especially, see, *e. g.*, Sheriff *v.* Coates, 1 Russ. & M. 159, *Ex parte* Fox, 1 V. & B. 67, and the other cases, referred to, *infra*, Pt. III. ch. 2.

(*b*) [P. III. ch. 1, § 1.]

(*c*) [As to admissions and waivers of proof, *vide supra*. But observe, admission of copies of attested instruments is not admission of the instruments; Fitzgerald *v.* Flaherty, 1 Moll. 350.]

(*d*) [See this and other forms in the Eq. Dig. by Van Heythuysen, p. 499, *et seq.*]

[And now, by an Order of 26th of August, 1841, No. 43, "In cases in which any exhibit may, by the present practice of the Court, be proved *vivâ voce*, at the hearing of a cause, the same may be proved by the affidavit of the witness who would be competent to prove the same *vivâ voce* at the hearing." (*a*) or by affidavit.

Reserving, until we come to the next section, (*b*) the full details of the mode of proof of exhibits, *vivâ voce* or by affidavit, it may be convenient here to observe, that this mode of dispensing with the usual means of examination, is properly applicable, only where no necessity exists for allowing the other side to cross-examine: and it is usually adopted in cases where the plaintiff has seen fit to proceed on bill and answer only, without going into evidence at all; or either party has omitted to prove some important or (at least) material document, admitting of being proved in this manner, until publication has past. (*c*)]

With regard to the means of proof, that is to say, the proper witnesses to be summoned, and the points on which it will be necessary to examine them, since exhibits vary greatly, it will be well to enumerate the principal heads under which they fall and to make a few observations on the means of proving each. Means of proof.

[A convenient distribution of the classes of documents most usually proved as exhibits in a cause seems to be this,—Records, —other Public documents not Records—and Private documents.] Classes of documents used as Exhibits.

[99]

Records are amongst the highest class of documentary evidence. (*d*) They are said, by C. B. Gilbert, to be "the Memorials "of the Legislature and of the King's Courts of Justice," and to be "authentic beyond all manner of contradiction." (*e*) Mr. Butler, in one of his valuable notes to Coke upon Littleton, (*f*) Records.

(*a*) [Sand. Ord. 886.]

(*b*) [P. II. ch. 3, § 6.]

(*c*) [See Dan. Ch. Pr., by H., 841, and cases there cited.]

(*d*) [Here the reader's attention may (perhaps usefully) be directed to the stat. 1 & 2 Vict. c. 94, "An Act for keeping safely the Public Records."]

(*e*) Gilb. on Ev. 7; and [as to Courts of Record, and the memorials of the proceedings in such Courts, the rolls of which are Records,] see Co. Litt. 117 *b*, and 260 *a*. [quoted at length below, p. 153; where Lord Coke says, "*Monumenta, quæ nos Recorda vocamus, sunt veritatis et vetustatis vestigia.*"]

(*f*) Co. Litt. 260 *a*. The authority which he seems to follow, the Report of the Committee on the Cottonian Library and Records, in 1732, divides them differently. Probably an act of Parliament will before long be founded on the Reports of the Record Commissioners, and will define what documents are to have for the purposes of evidence the force of Records; see a note, *infra*,

divides them into those which relate to the proceedings of the Houses of Parliament,—the Court of Chancery,—the Courts of Common Law,—and the Revenue; and it will be convenient nearly to follow this arrangement here.

1. Parliamentary proceedings.

First, then, with respect to Parliamentary Records;

[Amongst these there is a distinction recognised, even as to Acts of Parliament, strictly so called.]

Acts of Parliament; Public Acts.

The Public Statutes of the realm, [copies of] which are produced at trials for the purpose of bringing the law more strongly and correctly before the mind of the Judge, or of reminding him of historical facts, will be spoken of in a subsequent chapter. (*a*)

Private Acts.

Those [Acts, however] which do not come under the title of "Public General Acts," or of "Local and Personal Acts declared Public and to be judicially noticed," [although not the less Acts of Parliament,] are [for this purpose,] looked upon merely as the Records of the High Court of Parliament. (*b*)

How proved; by copies printed, or by copies examined.

They generally, for convenience, contain a clause that they shall be printed by the Kings' printers, and that a copy so printed shall be admitted as evidence. (*c*) But if they do not contain that clause, (*d*) then, as they cannot be removed from their repository, the Parliament Office, they must be proved by an examined copy, which a witness swears he has compared with the original, or has looked over it while the original was being read aloud. (*e*) But where a party acknowledges that he has acted under a private statute the printed copy will then be quite sufficient. (*f*)

[100]

Stat. 8 & 9 Vict. c. 113, s. 3.

[And now, as to certain Parliamentary and other Royal documents, not strictly Public Acts of Parliament, by stat. 8 & 9 Vict. c. 113, s. 3, (after 1st of November, 1845.)—"All

P. III. ch. 1, § 2. [Since the first edition of this Work, stat. 1 & 2 Vict. c. 94, *vide supra*, n. (*d*), and stat. 8 & 9 Vict. c. 113, hereafter noticed, have been enacted.]

(*a*) [Amongst the matters whereof the Courts take Judicial Cognizance.] *Vide infra*, P. III. ch. 1.

(*b*) Gilb. on Ev. 10, 13.

(*c*) [Where a private act contains the proviso, that it shall be taken notice of judicially, without being specially pleaded, a copy from the King's printer is evidence; Beaumont *v.* Mountain, 4 M. & R. 177, S. C. 10 Bing. 401.]

(*d*) Lord Parker, C. J., admitted the King's printer's copy of one without that clause; but the statute was in some measure of a public nature, for it was touching the institutions of the College of Physicians in London; Gilb. on Ev. 13.

(*e*) Reid *v.* Margison, 1 Camp. 469; Rolf *v.* Dart, 2 Taunt. 52; Lawrence, J., declared, that "it had been ruled so a hundred times," in Gyles *v.* Hill, 1 Camp. 471. [Further, as to examined copies, in general, *vide infra*, p. 159.]

(*f*) R. *v.* Shaw, 12 East, 479.

copies of Private and Local and Personal Acts of Parliament not Public Acts, if purporting to be printed by the Queen's printers, and all copies of the Journals of either House of Parliament, and of Royal Proclamations, purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, shall be admitted, as evidence thereof, by all Courts, Judges, Justices and others, without any proof being given that such copies were so printed."]

Printed copies of—Acts not Public Acts, —Journals of either House of Parliament, —or Royal Proclamations, purporting to be printed by proper printers.

[Such printed copies indeed, until the contrary is shewn, may very well be fairly considered as a superior class of examined copies.]

Semble such copies *quasi* examined.

The examined copy is the best evidence of which the nature of the matter to be proved admits, and therefore must not be confounded with secondary evidence, which will be discussed hereafter. (*a*) There are in fact three distinct principles upon which sworn copies assume the character of primary evidence; viz.—that the original is a record;—that it is a public document, which cannot be removed, without public inconvenience; or,—that in consequence of some obstacle, imposed by nature or by man, it cannot [possibly] be moved.

Examined copies are evidence; when original documents are Records, or Public, or cannot be removed.

The last of these three principles is very simple, and may be disposed of in a few words. An inscription on a monument is a common example of a physical impossibility preventing the production of the original, though it is known to be in existence and accessible. (*b*) Of a moral impossibility there is an instance in *Wharton* v. *Wharton*, where it is stated to be the custom in Spain, to deposit deeds in places appointed for their safe custody; from whence the law forbids their ever being taken away. (*c*)

Physically irremovable; or morally so.

The first and second of the above mentioned principles were

Journals of

(*a*) *Vide infra*, P. II. ch. 3, § 2.

(*b*) [Nevertheless instances have occurred of the removal, up to town, of the original tomb-stones. As in the very last case of a right to coat-armour being disputed by the College of Heralds; mentioned as Alderman Ladbroke's case, in a work on Heraldry.

So, at law, in trover and plea of lien, it was held, that a copy of a notice fixed up in the office of the plaintiff was admissible if the original was fixed to the freehold, but not if such notice were on a board which was movable; Jones v. Tarleton, 1 Dowl. N. S. 625. Again, at law also, in trespass, for shooting a dog, the Judge received a copy of a notice on a board fixed in the plantations, without notice to produce the original; Bartholomew v. Stephens, 8 C. & P. 728.]

(*c*) 2 Atk. 295; [and so, as to Java, see Brown v. Thornton, 1 Nev. & P. 339, case of a charter party, the original in a book of a notary public there; see also an examined copy of a letter of attorney, enrolled in Jamaica, admitted in Faulkner v. Daniel, 3 Hare, 221.]

Office copies.

But for greater convenience Office copies of the Record in the cause before the Court are generally used, and the Court admits them on seeing the signature of its own officer. (*a*) They are in fact, in the cause to which they belong, considered equivalent to the Record itself. (*b*)

Pleadings.

The proper officer to sign office copies of Bills, Answers, and Replications, is a Six-clerk; (*c*) but it may be mentioned here that the Six-clerk who signs the office copy is not responsible for its correctness. His signature is merely affixed as a certificate that the original has been filed. But it would seem that the Clerk in Court might be called to account for inaccuracies, for he employs a person to make the copy and writes on the back of it the word "examined." (*d*)

Reports.

Master's Reports are signed by the Master filed (*e*) and kept at the Report Office. (*f*)

Depositions.

Depositions are placed in the custody of the Six-clerks, and require the signature of one of them. (*g*) Here the Court of Chancery goes further than other Courts, for it receives office copies of depositions though the cause be not the same; recognizing the signature of its own officer. (*h*) At common law they would not be received unless proved to have been regularly examined with the roll, for "though the Court of Chancery may for its

Ord. 372, one of 25th Nov. 1691, ib. 343, one of 18th Jan. 1815, ib. 703, and one of 11th Nov. 1841. No. 4, ib. 893, as to clerks in Court; and, lastly, an Order of 26th October, 1842, No. 3, as to duties of the clerks of records and writs; by which, "attendance with records and exhibits on the Judges of the Courts, or the Masters in ordinary, and at the assizes or elsewhere," is directed to be performed by the clerk of records and writs, ib. 916.]

(*a*) [This was expressly provided for by an Order of 38 Eliz. (23rd June, 1596) Sand. Ord. 73; and see an Order of 10 Car. 1 (1634) to this effect; ib. 170; see also an Order of 25th Nov. 1691, as to penalty incurred by producing and offering to be read, any pleadings or proof not signed by the proper officer; ib. 394; and further as to Office and other copies, see Sand. Ord. Index, *voce* Copies.]

(*b*) Lord Mansfield in Denn *v.* Fulford, 2 Burr. 1179. [*Sed quære*, for how office copies are made, *vide infra*. The mere production of an office copy of a bill, filed, without proof of identity of the person filing it, was held insufficient evidence of the fact to prove a forfeiture thereby incurred; Williams *v.* Knipe, 5 Beav. 273. And that office copy of a bill may be insufficient to be used as evidence at law as an examined copy on a trial for perjury, being abbreviated; see Reg. *v.* Christian, 1 Car. & M. 388, *ut supra*, p. 150, n. (*f*).]

(*c*) [Now, by Order of 26th October, 1842, No. 3, a Clerk of Records and Writs; Sand. Ord. 916. And, by the way, the clerk of records and writs is not bound or compellable to file an answer of a defendant who has refused to take an office copy of the bill; Aked *v.* Aked, 11 Sim. 437.]

(*d*) Browne *v.* Barnard, Jac. 57.

(*e*) [See, as to filing, an Order of 29th Oct. 1692, Sand. Ord. 396.]

(*f*) [See Sand. Ord. Index, *voce* Report Office.]

(*g*) [Now, by an Order of 26th Oct. 1842, No. 3, the Clerks of Records and Writs; Sand. Ord. 916-17. As to Affidavits generally, *vide infra*, P. III. c. 7.]

(*h*) Bull. N. P. 229; Black *v.* Lord Braybrook, 2 Stark. Rep. 14. [And see Phill. on Ev. 9th edit. vol. 2, p. 131, n. (3).]

convenience have empowered its officers to make out such copies as should be evidence, yet the particular rules of their Court are not to be taken notice of by the Courts of common law."(*a*) Yet a copy of depositions which have been sworn *de bene esse* at a Judge's chambers is admitted under the signature of the Judge, his clerk delivering it out as an office copy. (*b*) [103]

Exemplifications, &c.

To supply the want of the Record itself in another cause or another Court, exemplifications or examined copies may be used. Exemplifications of proceedings in Chancery, and in certain other Courts, which are attested by their seals alone without the intervention of witnesses, do not fall within our present chapter. (*c*) Examined copies will be spoken of presently.

III. Records of other Courts.

Thirdly; With respect to the Records of other Courts. A Record [meaning a judicial one as recognised] in the Courts of common law, is defined, by Sir Edward Coke, to be, "a memo-"rial or remembrance in rolls of parchment, of the proceedings "and acts of a Court of Justice which hath power to hold a "plea according to the course of the common law, of real or "mixed actions, or of actions *quare vi et armis*, or of personal "actions, whereof the debt or damage amounts to 40*s.* or above, "which we call Courts of Record, and are created by Parlia-"ment, letters patents, or prescription." (*d*) They all prove themselves by mere production, if in their own Court; and when produced elsewhere either Records themselves or exemplifications of Records, if the seal affixed to them be the seal of one of the superior Courts, require no further evidence. (*e*)

Common Law Courts of Record.

The Records,

or Exemplifications,

under the seal of the Court.

(*a*) Gilb. on Ev. 25. [Upon a similar principle, see Holcroft *v.* Smith, 1 Eq. Ca. Abr. 224, the Courts of law admit no depositions of living witnesses to be read as evidence; *vide infra.* But because, in a civil proceeding at law, the office copies of the depositions in Chancery are good evidence, the originals will not be ordered to be produced; Att. Gen. *v.* Ray, 6 Beav. 355; and see Stratford *v.* Green, cited above: but as to a criminal case, see Reg. *v.* Christian, cited above, p. 150, n. (*f*). And in a case where a commission of bankruptcy had been superseded, and an action brought, the Lord Chancellor ordered the commission and proceedings to be delivered by the solicitor to the secretary, and by him to the associate, to be produced on the trial, with liberty to inspect and copy; such an order was however properly refused by the Judge; *Ex parte* Warren, 19 Ves. 162.]

(*b*) Duncan *v.* Scott, 1 Camp. 102. [As to proof of the signature of a Judge, see the statute cited below.]

(*c*) [As to such, see Sand. Ord. Index, *voce* Exemplifications; *et*] *vide infra*, P. III. ch. 1, § 2.

(*d*) Co. Litt. 260 *a*. To show the meaning of the word, he quotes from Cicero, "*dicere nihil aliud est quàm recordari;*" and from Virgil, "*si ritè audita recordor.*" [*Et vide supra*, p. 147, p. 150, n. (*d*), *et* ibid. n. (*e*).]

(*e*) *Vide infra*, P. III. ch. 1, § 2.

Other Courts.

But records and exemplifications from the inferior Courts, (when they have not been removed by *certiorari* into the Court of Chancery for the sake of being authenticated by the Great Seal,) and exemplifications of judicial proceedings in Courts where the law is different from the common law of England, (*a*) require the seal of their own Court to be sworn to by a witness. (*b*) C. B. Gilbert says, that "the seals of private Courts or of private persons are not full evidence by themselves without an oath concurring to their credibility, for it is not possible to suppose these seals to be universally known, and consequently they ought to be attested by something else, *i. e.*, by the oath of some that have knowledge of them." (*c*) Thus when an exemplification of a sentence given by the lords of the session in Scotland was received, in the Irish Court of Chancery, the sentence was reversed, by the House of Lords here, on appeal. (*d*) Similarly the seal of the University of Saint Andrew's, in Scotland, to an instrument, purporting to confer a degree, was held insufficient. (*e*) That of the Court of the Island of Grenada needed proof, and without it a sealed copy of a record from thence could not be considered as an exemplification, though it had signatures of the Judges there, strongly attested. (*f*) A copy, however, authenticated by the signature of the Judge, (*g*) has been taken as an exemplification, when it was proved that

Exemplifications;—but seals to be proved.

[104]

Examples.

When Court has no seal, copy signed by a Judge.

(*a*) [*Vide* Co. Litt. 260, *a.*, where Lord Coke says, "But *legally* records are restrained to the Rolls of such only as are Courts of Record;" as to which, *vide supra*, p. 150, n. (*c*).]

(*b*) Except the Ecclesiastical Courts in the case of wills; *vide infra*, P. III. ch. 1, § 2. [Probate copy of a will and letters of administration are, in fact, only copies of the records of the Ecclesiastical Courts; therefore, should such be lost, others, called expressly exemplifications, may be granted; but see Doe *v.* Gunning, 2 Nev. & P. 268.

As to documents of which the Court takes judicial cognizance, *vide infra.*]

(*c*) Gilb. on Ev. 20. [But where an act of Parliament constitutes a Court with a seal; held, that it was not necessary to prove the seal, but the Court would take judicial notice of it, the seal itself being the instrument of proof; Doe *v.* Edwards, 1 Perr. & Dav. 408. As to seals, stamps, and signatures by handwriting of certain official and other documents, see stat. 8 & 9 Vict. c. 113, set out below.

Here, by the way, may be referred to, (as analogous,) a case as to the evidence necessary, in the Courts at Calcutta, to prove bankruptcy, &c., here; Clark *v.* Mullick, 3 Moore, (Jud. P. C.) 252.]

(*d*) Anon., cited 9 Mod. 67. But an exemplification of a sentence in Holland was admitted to show the bare fact that there had been a sentence there; Anon. 9 Mod. 66.

(*e*) Moises *v.* Thornton, 8 T. R. 303. [But an examined copy of the entry in the book of acts of a university, was held admissible, to prove a degree; Collins *v.* Carnegie, 3 Nev. & M. 703; and 1 Ad. & Ell. 695.]

(*f*) Henry *v.* Adey, 3 East, 221.

(*g*) [As to signature of a Judge, see the statute, 8 & 9 Vict. c. 113, s. 2, as set out below.]

the Court possessed no seal. (*a*) But where the seal was so much worn that it would make no impression, still it ought to have been affixed, and then, if any one could have ventured to swear to it, the instrument would have been good as an exemplification. (*b*)

When Court has a seal, it must be affixed.

In one case the Judges of the King's Bench said, "It seems doubtful whether any document can be given which would be equivalent to a regular exemplification: in such a case," they continued, "it was held that the only equivalent for such authentification is where there is an officer required by law to deliver out copies, and who, (as the chirographer of a fine,) will not have discharged his duty until he has delivered out copies to persons whose title is concerned." (*c*) The proof of fines strongly illustrates the strictness of the rule: the chirograph is evidence of the fine itself, because the chirographer is empowered and directed by common law to give out copies of the agreements that are lodged of record; but it is not evidence of the proclamations, when the fine has been so levied, because he is not authorized by the statute to give out copies of them. (*d*)

A copy when authenticated by signature.

Chirograph of a fine.

[105]

A copy of a Court roll under the steward's hand is good evidence to prove the copyholder's estate, but the steward's signature must be proved. (*e*) In some instances the Legislature has made certified copies very nearly equivalent to an exemplification in the superior Courts. For example; the stat. 38 Geo. 3, c. 78, after requiring certain affidavits to be made respecting newspapers, enacts (§ 14.) "That in all cases, a "copy of any such affidavit or affirmation, certified to be a

Copy of a Court Roll.

Copy made evidence by certain Acts of Parliament.

(*a*) Alves *v.* Bunbury, 4 Camp. 28; it came from the Island of St. Vincent.

(*b*) Cavan *v.* Stewart, 1 Stark. Rep. 525. And *vide infra*, P. II. ch. 2, § 2. (1).

(*c*) Appleton *v.* Lord Braybrook, and Black *v.* Lord Braybrook, 2 Stark. Rep. 6, 7.

(*d*) Gilb. on Ev. 24. 26. It seems to have been considered in old times not quite so strong evidence, *vide infra*, P. III. ch. 1, § 2. [An examined copy of the record of a fine was held to be as good evidence thereof as the chirograph would have been, signed by the officer of the Court; Doe d. Gilbert *v.* Ross; 7 Mees. & Wels. 102.]

(*e*) D. of Somerset *v.* France, Fortescue, 43; and see Snow *v.* Cutler, 1 Keb. 567; Lord Hardwicke did not require even the signature of the steward, after thirty years; Dean of Ely *v.* Steward, 2 Atk. 44; see Appleton *v.* Lord Braybrook, 6 M. & S. 38. [The "copy," on which the Stamp Act imposes a duty, means that authenticated copy, of any instrument, receivable as evidence, in the first instance; Braithwaite *v.* Hitchcock, 10 Mees. & Wels. 494. The copy of Court rolls which requires a stamp, is that examined copy given out and signed by the steward; Doe d. Burrows *v.* Freeman; 12 Mees. & Wels. 844.]

" true copy, under the hand or hands of one or more of the com-
" missioners or officers in whose possession the same shall be,
" shall, upon proof made that such affidavits have been signed
" with the handwriting of the person or persons making the
" same, and whom it shall not be necessary to prove to be a
" commissioner or commissioners, or officer or officers, be re-
" ceived in evidence, as sufficient proof of such affidavit or affir-
" mation, and that the same was duly sworn or affirmed, and
" of the contents thereof," &c. In others a slight degree of
Insolvent Acts. further proof, has been required. The stat. 53 Geo. 3, c. 102, s. 24, speaks of various documents, and enacts " that a true
" copy of every such petition, schedule, order, judgment, and
" other proceedings signed by the officer in whose custody the
" same shall be, or his deputy, certifying the same to be a true
" copy of such petition, schedule, order, judgment, or other
" proceeding, as the case may be, without being written on
" stamped paper, shall at all times be admitted, in all Courts
" whatever, as legal evidence of the same respectively."(*a*) Under this clause Lord Lyndhurst refused a copy tendered *vivâ voce* with the signature of Mr. Lamb, the officer of the
[106] Insolvent Court, for he said that he wanted evidence both of the signature and of Mr. Lamb's being actually the officer.(*b*) The

(*a*) This section is repeated in stat. 1 Geo. 4, c. 119, s. 45, but repealed by stat. 7 Geo. 4, c. 57.

(*b*) Flint *v.* Watson, Exch., 10th December, 1832, MS.; *vide infra*, § 6. The clause in the Insolvent Act of 7 Geo. 4, c. 57, is in an amended form, and remedies the difficulty. That act empowers the Court to have an official seal, and directs, in s. 76, " That " a copy of such petition, schedule, " order, and other orders and proceed-" ings, purporting to be signed by the " officer in whose custody the same " shall be, or his deputy, certifying the " same to be a true copy of such peti-" tion, schedule, order, or other pro-" ceeding, and sealed with the seal of " the said Court, shall at all times be " admitted in all Courts whatever, and " before commissioners of bankrupt and " justices of the peace, as sufficient " evidence of the same, without any " proof whatever given of the same, " further than that the same is sealed " with the seal of the said Court, as " aforesaid." But this act goes still further, for it provides, (s. 19,) that the conveyances and assignments directed by it " shall be filed of Record " in the said Court; and a copy of any " such Record made upon parchment, " and purporting to have the certificate " of the provisional assignee of the said " Court, or his deputy appointed for " that purpose, endorsed thereon, and " to be sealed with the seal of the said " Court, shall be recognised and re-" ceived as sufficient evidence of such " conveyance and assignment, and of " the title of the provisional and other " assignee or assignees under the same, " in all Courts, and before Commission-" ers of Bankrupt, and Justices of the " Peace, to all intents and purposes, " without any proof whatever given of " the same or of any other proceedings " in the said Court, in the matter of " such prisoner's petition." [Although certified copies of assignments to and from the provisional assignee are made evidence, by 7 Geo. 4, c. 57, s. 76, yet

same proof would probably be required of copies offered under the stat. 6 Geo. 4, c. 16, § 97, which provides "That in every "action, suit, or issue, office copies of any original instrument "or writing filed in the office or officially in the possession of "the Lord Chancellor's secretary of bankrupts shall be evidence "to be received of every such original instrument or writing "respectively." So also, that an officer signing a copy of the enrolment of a bargain and sale under the stat. 10 Anne, c. 18, § 3, really filled the situation; and so of the registrars under either of the Registry Acts. (*a*)

Bankrupt Acts.

Copies of the enrolments of deeds.

[But most, if not all of these difficulties are now removed, by the late "act to facilitate the admission in evidence of certain official and other documents," (after the 1st of November, 1845, viz. The stat. 8 & 9 Vict. c. 113, of which sect. 1, is as follows:—

Act to facilitate the admission in evidence of certain official and other documents.

"Whereas it is provided, by many statutes, that various "certificates, official and public documents, documents and "proceedings of corporations, and of joint stock and other "companies, and certified copies of documents, bye-laws, entries "in registers and other books, shall be receivable in evidence of

Stat. 8 & 9 Vict. c. 113, s. 1.

Preamble.

where the insolvent petitioned, and his effects were assigned, under 53 Geo. 3, c. 102; held, that such copies were not sufficient: Doe d. Threlfall *v.* Sellers, 6 Ad. & Ell. 328. But when the petition and assignment were made under 1 Geo. 4, c. 119; held, that they might be proved, after 7 Geo. 4, c. 57, according to the directions of sect. 76, although it did not appear that the proceedings had gone on to the discharge of the party, and final assignment of his effects; Doe d. Ellis *v.* Hardy, 6 Ad. & Ell. 335. A certified copy, upon parchment, of the vesting order and appointment of assignees, purporting to be sealed with the seal of the Insolvent Debtors' Court, and certified by the deputy of the provisional assignee, was held sufficient evidence at law, without proof of the appointment of such deputy; Jackson *v.* Thompson, 2 Gale & D. 598. Certified copies of the Schedule may be given in evidence, under the Insolvent Act, by parties other than the insolvent and his creditors; Price *v.* Assheton, 1 Y. & Coll. 441. The order of appointment of the assignee of an insolvent, proved by copy, under 1 & 2 Vict. c. 110, s. 105; but not the time of his title accruing; Yorke *v.* Browne, 10 M. & W. 78; S. C., 2 Dowl. N. S. 83. The schedule of an insolvent, shewing the date of his petition and statement of his liabilities, held inadmissible, to prove that a previous assignment was executed, with the intention of so petitioning; Peacock *v.* Harris, 6 Nev. & M. 854.]

(*a*) See the Registry Act for Middlesex, stat. 7 Anne, c. 20, s. 6; and those for Yorkshire, West Riding, stat. 2 & 3 Anne, c. 4, s. 8; East Riding, stat. 6 Anne, c. 35, ss. 11 & 17; North Riding, stat. 8 Geo. 2, c. 6, s. 12. [An examined copy of an entry in the Middlesex registry of deeds was received as secondary evidence of the original, which could not be obtained, (*per* Tindal, C. J.;) Collins *v.* Maule, 8 C. & P. 502. As to proof of inrolment of a conveyance to charitable uses, under stat. 9 Geo. 2, c. 36, see Doe d. Williams *v.* Lloyd, 1 Sc. N. S. 505, and 1 Man. & Gr. 671. As to the book of shares of a Railway Company, under the seal of the Company, being evidence of proprietorship; see L. & Y. Railw. Comp. *v.* Price, 9 Car. & P. 55.]

" certain particulars in Courts of Justice, provided they be " respectively authenticated in the manner prescribed by such
Certain documents to be received in evidence
" statutes: And whereas the beneficial effect of these provisions " has been found, by experience, to be greatly diminished by " the difficulty of proving that the said documents are genuine; " and it is expedient to facilitate the admission in evidence of " such and the like documents: Be it therefore enacted, &c., " That whenever, by any act now in force, or hereafter to be " in force, any certificate, official or public document, or " document or proceeding of any corporation or joint stock or " other company, or any certified copy of any document, bye- " law, entry in any register or other book, or of any other " proceeding, shall be receivable in evidence of any particular " in any Court of Justice, or before any legal tribunal or either " House of Parliament, or any committee of either House, " or in any judicial proceeding, the same shall respectively be " admitted in evidence, provided they respectively purport to " be sealed or impressed with a stamp, or sealed and signed, or " signed alone, as required, or impressed with a stamp and " signed, as directed by the respective acts made or to be here-
without proof of seal, stamp, signature, &c.
" after made, without any proof of the seal or stamp, where a " seal or stamp is necessary, or of the signature or of the official " character of the person appearing to have signed the same, " and without any further proof thereof, in every case in which " the original record could have been received in evidence." (*a*)

Office copies generally.

When an officer is specially authorized to make out copies, not by the Law, but by the Court, these are the common Office copies, of which so constant a use is made in Equity. In all
[107]
Courts they are admitted, for convenience, in the cause to which they belong, and are in fact, so far, equivalent to the Record itself. (*b*)

(*a*) [Section 3 of this act,—as to documents purporting to be printed by an authorised printer, is set forth *supra*, p. 148-9; and we shall have further occasion to advert to this Statute, under the head of "Evidence whereof the Court takes Judicial Notice;" *vide infra*. In the case of "registers, or other books," commonly called, "non-parochial registers;" see stat. 3 & 4 Vict. c. 92, purporting to be "for enabling Courts of Justice to admit them as evidence," &c.; but *semble*, that act was not carried into full effect, *vide infra*.]

(*b*) Lord Mansfield in Denn v. Fulford, Burr. 1177. [As to a copy of a sequestration not being sufficient to take a bill *pro confesso* upon, under the old practice, see Anon. 10 Mod. 431; but a sequestration not being under seal or executed was, in the same case, held to

If a person in an official situation makes out a copy or signs it, without having any special authority to do so, there is no advantage whatever gained: he must appear and swear to it like any other individual. A copy of a judgment, though endorsed to have been examined by a clerk in the Treasury, was not evidence, because to make out copies was not part of his necessary office; he being entrusted only to keep the records for the benefit of all mens' perusal.(*a*) A copy of the enrolment of a deed made out by the clerk of Assize, is not evidence, without proving it examined; because the clerk's duty is only to authenticate the deed itself by enrolment. (*b*) Thus when copies were put in, by way of exemplifications, having the signatures of the Judges instead of the seal of the Court, the signatures were treated as mere nullities. (*c*)

Copies by persons in office but not duly authorized.

Examples.

If no exemplification or properly authenticated copy has been procured, (*d*) a copy sworn to have been examined with the original, is admitted in proof of a Record. (*e*) Here, as in proving Statutes, the witness must swear that he has either compared it line by line, or that he has looked over it while the original was being read aloud. (*f*) He must also prove that

Copies sworn to have been examined with the original.

Proof of the

be no objection.

But even what purports to be an office copy of a bill cannot be read in evidence, if the original is not on the file, though the officer is ready to prove that the original cannot be found amongst the records; Irwin *v.* Simpson, 7 Bro. P. C. 317. *Sed vide infra*, p. 163.

Where an answer is required, as evidence on a trial at law, except in a criminal case, the Court of Chancery does not permit the record itself to go down, but an office copy only; unless, indeed, proof of the signature is wanted; nor is it granted where an action is by a stranger unconnected with the suit in equity; Furwis *v.* White, 8 Ves. 313. But, as to a copy of a bill to be used on a trial for perjury, see Reg. *v.* Christian, *supra*, p. 150, n. (*f*). The Court refused an application to order the original depositions, taken in a cause in equity, to be produced on a trial at law, production and proof of the office copies being sufficient; Atty. Gen. *v.* Ray, 6 Beav. 335, and see Stratford *v.* Green, 1 Ball & B. 286, *supra*, p. 150, n. (*f*).

As to the reception, at law, of office copies of depositions in equity, see Phill. on Evid, 9th ed. vol. 2, p. 131, n. (3). And as to office copies of proceedings in Chancery generally, *vide supra*, p. 152.]

(*a*) Gilb. on Evid. 25.

(*b*) Ibid.

(*c*) Henry *v.* Adey, 3 East, 321; *vide supra*, p. 154; Cavan *v.* Stewart, 1 Stark. Rep. 525. [But as to the signatures of the Judges, to certain documents, see now stat. 8 & 9 Vict. c. 113, s. 2, set out below.]

(*d*) [As to exemplifications, *vide infra*, P. III. ch. 1, § 2.]

(*e*) [But, *semble*, not if there are such abbreviations as in Reg. *v.* Christian, *ut supra*.]

(*f*) See note (*e*), p. 148, *supra*.

[To make such a copy of a record admissible in evidence, it is not enough that it was held by a witness whilst another read the original to him; there should be a change of hands, or the witness must himself read the copy with the original; Slane Peerage Case, 5 Cl. & Fin. App. Cas. 24.

The stat. 36 Geo. 3, c. 52, s. 27, making a copy of the entry, in the books of the commissioners of stamps, as to the payment of duty on a legacy, evidence of

custody of the original. Examples.

the original came from the proper place of deposit, or from the hands of the officer in whose custody it ought to be. When the Records of the Superior Courts at Dublin were kept in the room over the Four Courts, it was not sufficient that a witness swore he was taken there by an attorney who then produced a parchment roll, he did not see from whence. (*a*)

How much of the Record such copy must contain.

A sworn copy ought to contain, not a part only of the record, but the whole; at least, so much as concerns the matter in question. (*b*) However "this rule admits of some exceptions; (*c*) In cases of inquisitions *post mortem*, and such private offices, you cannot read the return without also reading the commission; (*d*) but in cases of more general concern, such as the minister's return to the commission in H. VIII.'s time, to inquire into the value of livings, it would be of ill consequence to oblige the parties to take copies of the whole record, and the commission is a thing of such public notoriety that it requires no proof." (*e*) The principle is obviously to secure the Court against deception by means of garbled copies, and the distinction is to be found in the nature of the matter which the document is brought forward to prove; although, as it is admitted by C. J. Willes, no very accurate general rule can be laid down on the subject. (*f*) If nothing more is desired to be proved than the

[168]

The principle.

According to

that fact; held that such a copy must be proved by a party who has himself compared it with the original; Harrison *v.* Borwell, 10 Sim. 360. An examined copy, of the record of a conviction, in the custody of the clerk of the assize, was received, notwithstanding the suggestion of the witness, of the original being on paper, whilst the son of the clerk stated that all records in his father's office were on parchment; Reg. *v.* Pembridge, 1 Car. & M. 157. And (by the way) that all Records, strictly so called, ought to be on parchment, see Co. Litt. 260 *a*. At law, to give evidence of the transcript of the rules of a benefit society, inrolled at the office of the clerk of the peace, by proof of an examined copy of it, the witness, who examined the copy with the transcript, must prove that he examined the copy of all the rules with the transcript; Reg. *v.* Boynes, 1 Car. & P. 65. An examined copy of an entry in a parish register of marriages received in evidence, although the entry attested by one witness only; Doe d. Blaynty *v.* Savage, 1 Car. & K. 487.]

(*a*) Adamthwaite *v.* Synge, 4 Camp. 32.

(*b*) Gilb. on Evid. 23.

(*c*) [The reason of the rule, that a copy of the whole judgment, and not a partial extract only of it, must be submitted to the jury, applies equally to proceedings in equity, and indeed every other written instrument; Brockman's case, Gilb. Evid. 51. And see an Order of April, 1596, as to exemplifications of depositions; not to be "by parcels, omitting the residue of that deponent." Sand. Ord. 71.]

(*d*) [An *inquisitio post mortem* is not evidence unless it is proved that a commission was issued to support it; Newburgh *v.* Newburgh, 3 Bro. C. C. 553; see also Evans *v.* Taylor, 3 Nev. & P. 174, as to a survey.]

(*e*) Quoted in Bull. N. P. 228, as having been said by Lord Hardwicke in Sir Hugh Smithson's case.

(*f*) Fisher *v.* Kitchingman, Willes, 367. [Exemplification of part only of a patent was not allowed to be read in

bare fact that a certain proceeding took place, or that a certain document forming part of a record exists, or any thing which follows necessarily from the mere fact of its existence, then such a document may be put in alone. For instance, in an action upon a wager, whether a decree of the Court of Chancery would be reversed on appeal to the house of Lords, proof of the decree and reversal is sufficient, without shewing the previous proceedings below: (*a*) so on a question whether a certain person was alive, or in England, on such a day, a deposition made by him in a Chancery suit might unquestionably be read alone without the pleadings. (*b*) But where the document is to be read for the sake of proving ulterior facts from the sense of it, and it is therefore material to see that it is thoroughly understood, and that it has remained unaltered, then the proceedings connected with it must be proved. As an example,—where an answer in a former equity suit is put in to show certain admissions therein made by the party, for such a purpose it is absolutely necessary to prove the bill as an introduction to the answer. (*c*) Thus when a verdict is offered to show what was the opinion of a jury on a certain point, it is necessary to prove that this was the final verdict, and that neither was the judgment arrested nor a new trial granted; (*d*) therefore the *nisi prius* record with the *postea* endorsed is not sufficient; and if it was a common law trial, a copy of the judgment that followed it must be produced, or if it was an issue out of Chancery then a copy of the decree that was founded on it. (*e*) C. J. Willes speaks to the same effect; the record of *nisi prius* and the *postea* endorsed,

the facts to be proved, part may be sufficient,

Instances.

or the whole essential.

Instances.

[109]

Verdict.

evidence, in Atty. Gen. *v.* Taylor, Pr. Ch. 59, *et vide supra*, n. (*b*).]

(*a*) Jones *v.* Randall, Cowp. 17.

(*b*) Gilb. on Evid. 56.

(*c*) Gilb. on Evid. 56. [The bill and answer or the defendant's contempt, for the depositions, &c.

But an answer in Chancery is evidence at law, as an admission under the defendant's hand, when the bill is proved to have been lost; Hart *v* Harrison, Mich. 3 Geo. 2; 1 Ford's MS. 145, cited in Starkie on Evid. 3rd edit. vol. 1, p. 415, n. (*f*).

A decree of the Court of Arches, for alimony, is not admissible in evidence, without proof of the proceedings in the suit. When a suit is removed by appeal, from the Consistory Court to the Court of Arches, the judgment of the Court above is not admissible in evidence, without showing that Court to have been duly in possession of such suit, by producing the proofs of appeal, viz. the transcript of the proceedings sent from the Court below; Leake *v.* Westmeath M. of, 2 Moo. & R. 394.]

(*d*) Bull. N. P. 334; citing Montgomerie *v.* Clark, 1745, before the delegates.

(*e*) Bull. N. P. 334; where it is stated that in issues sent from Chancery it is not usual to enter up judgment.

he says, "are evidence, or not, according to the nature of the thing which they are produced to prove. If they are produced to prove only that a cause was brought to trial, or that such a cause was actually tried, they are good and proper evidence; but if it be necessary that a verdict should be given in evidence, they are not sufficient, but the *postea* ought to be returned, and the verdict entered on record, and judgment entered upon it, and then a copy of the record is proper evidence." (*a*) The *postea* without the judgment was all that was necessary to prove that a trial was had between the same parties; so as to introduce an account of what a witness, since dead, had sworn, at that trial. (*b*) It has also in one case at law, (and, it is there said, commonly in Chancery,) been held to be good evidence to prove conclusively its own amount. (*c*)

Decree.

The last instance is rather a relaxation of the rule laid down above; but in applying it to a decree (or decretal order) in equity, (*d*) we find asserted (and it seems consonant to principle,) that when the decree contains a recital of the bill and answer, it may be admitted without farther proof of them, (*e*) but when it merely gives their substance, it is inadmissible until they have first been proved. (*f*) Yet there is

[110]

(*a*) Fisher *v.* Kitchingman, Willes, 367.

(*b*) Pitton *v.* Walker, 1 Str. 162.

(*c*) Garland *v.* Schoones, 2 Esp. Rep. 648.

(*d*) [By an Order of Jan. 1618-19, Bacon, C., No. 71, "Decrees in other Courts may be read, upon hearing, without the warrant of any special order;" Sand. Ord. 118.]

(*e*) Trevor, C. J., in Wheeler *v.* Lowth, cited in Com. Dig. (C. i.) 97; and Twisden, J., in Trowell *v.* Castle, 1 Keb. 21; because ambiguities may be "thereby explained and omissions supplied," *arg.* in Bernardi *v.* Mottem. Doug. 579.

(*f*) Trowell *v.* Castle, 1 Keb. 21. In this case there seems to have been a considerable difference of opinion respecting the practice. It is probable that the confusion arose from the circumstance of the mode of drawing up decrees having itself varied. In very ancient times they were endorsed in a few lines on the bill. About the reign of Edw. 6, they appear first, (as they ought to be now, but it is much disused, see Mitf. on Pl. 70); to have been entered in the Registrar's book and then regularly enrolled on separate parchments, but with little addition to their length. But by the first year of Eliz. it had become the practice to "interweave" considerable portions of the pleadings with the directions, prefacing each decretal clause with the grounds of it, and this degenerated into prefacing the whole decree with almost the entire pleadings, evidence, &c. To remedy the evil, Lord Coventry, C., [by an Order,] in 1635, [No. 12,] directed that "The registrars in drawing "up orders shall use all convenient "brevity according to the manner of "ancient times; they shall mention the "material reports, affidavits, and former "orders, [upon which any new order is "grounded,] to have been read, but "shall not repeat them;" &c. Bea. Ord. 75; [Sand. Ord. 179.] Still the Lords Commissioners in 1649, thought it necessary to order that "no decree "should recite the bill, answer, pleadings, or depositions, or any of them, "*verbatim*, but only the short state of "the matter, and the decretal order, "and the opinion and judgment of the

authority that, "If a party wants to avail himself of the decree only and not of the answer or depositions, the decree being under the seal of the Court and enrolled, may be given in evidence without producing the bill and answer, and the opposite party will be at liberty to shew that the point in issue there, was not *ad idem* with the present issue." (*a*) It is not easy to see the ground for this, for the objection applies to an exemplification just the same as to an examined copy, and their not being strictly records does not appear a sufficient reason for distinction; but it seems to have been held for law, in a case in the Exchequer; Serjeant Maynard boldly assuring the Court that nothing was more common. (*b*)

[111]

When copies of part of the proceedings admitted.

Depositions without bill or answer.

Where there is an impossibility of producing the rest of the record or proceedings, the single document is admitted without it; a sentence in the Admiralty was admitted alone when the libel could not be found in the office. (*c*) An exemplification of depositions in Chancery was received when the Court supposed the bill and answer to have been destroyed in the fire at the Rolls in 1618. (*d*) The depositions in a cause in 1686 were admitted in the Exchequer in 1816, the keeper of the records having sworn that he could find neither the bill, the answer, nor the decree. (*e*) As to depositions, however, Lord Ellenborough very much relaxed the rule: he said of some in the Exchequer, that if they had been of long standing, where, by presumption, the commission might be lost, he might perhaps

"Court." Bea. Ord. App. 501; [Sand. Ord. 236.] But as the orders of the Lords Commissioners were probably imperfectly and uncertainly obeyed, it is not surprising that in the year 1661, there should have been a difference of opinion among the judges of the K. B. as to the extent of credit that decrees could claim. See Seton on Decrees, Preface, and p. 6; Rep. of Ch. Com. p. 18 and 322. [And see the Orders of Nov. 1743, Hardwicke, C., the rules as to the recitals to be contained in decrees and orders; Sand. Ord. 568. Also the Order of Nov. 1833, Brougham, C., No. 17, continuing the then rules temporarily; Sand. Ord. 777. And lastly, the Order of Dec. 1833, Brougham, C., No. 27, directing "That except in orders for special injunctions, in which the usual recitals shall be inserted as heretofore, neither the bill nor answers nor any part thereof be stated or recited in the original decree or order, &c." Sand. Ord. 782, *et seq.*, and Forms of Decrees, ibid. 789 and 790.]

(*a*) Thanet Lord, *v.* Patterson, K. B. East, 12 G. 2, cited in Bull. N. P. 235.

(*b*) Trotter *v.* Blake, 2 Mod. 231; we are not however informed what were the recitals there.

(*c*) Trevor, C. J., in Wheeler *v.* Lowth, Com. Dig. Ev. (C. 1.) p. 98.

(*d*) Blower *v.* Ketchmere, 2 Keb. 31.

(*e*) Bryan *v.* Booth, 2 Pri. 234, note; and see Illingworth *v.* Leigh, 4 Gwil. 1615; and see the latter part of R. and Lord Hunsdon *v.* Lady Arundel, Hob. 112. [But see Irwin *v.* Simpson, *supra*, p. 158, n. (*b*).]

have admitted them alone; but where they had been lately taken, he should require the commission to be produced: but that no state of things could make it necessary to produce the bill and answer, provided the authority under which the depositions were taken, namely, the commission, was produced. (*a*)

Proceedings in other Courts.

Lord Mansfield required the production of a *procés verbal*, on which an *arrêt* had been pronounced in the French Admiralty Court; but then the *arrêt* did not quite sufficiently explain itself, or it seems it would have been admitted alone. (*b*) Lord Kenyon seemed disposed to be of opinion, "that a sentence of divorce *a mensâ et thoro* in the Spiritual Court was sufficient without the libel and all the proceedings." (*c*)

Documents of a judicial nature but not records.

It will have been observed that in the two preceding paragraphs a great variety of records are mentioned. In fact, as we have stated before, *all records* may be proved by sworn copies: but errors are sometimes made in this respect and a copy is offered of a document which is not the actual record itself. Thus in the King's Bench a copy, signed by the Master, of a

[112]

judgment which has never been delivered into Court on parchment and made a record, is not evidence, though on such judgment execution may be taken out. (*d*) Neither is the judgment book of the Court, nor consequently a copy of it, available, although the record of the judgment roll may have never been made up. (*e*)

Sworn copies not secondary evidence.

A sworn copy, though not equal in authority to an exemplification, is not [mere] secondary evidence, for the existence of an exemplification is not implied by it, and the [production of the] record itself, by the rule of law mentioned a few pages back, is out of the question. (*f*) Indeed if the record itself does not exist, and consequently no one can swear that he has examined

(*a*) Bayley *v.* Wylie, 6 Esp. 85. [As to depositions, (by the way,) the Order of Jan. 1618-19, Bacon, C., No. 71, *ut supra*, p. 162, n. (*d*), continues thus: "But no depositions taken in any other Court are to be read but by special order; and regularly the Court granteth no order for reading of depositions, except it be between the same parties, and upon the same title and cause of suit." Sand. Ord. 118.]

(*b*) Bernardi *v.* Motteux, Doug. 574.

(*c*) Stedman *v.* Gooch, 1 Esp. Rep. 6. [*Et vide supra*, p. 161, n (*c*), as to parts of proceedings in the Ecclesiastical Courts.]

(*d*) Bull. N. P. 228.

(*e*) Ayrey *v.* Davenport, 2 Bos. & Pul. N. R. 474; Sir J. Mansfield says there, "I have no conception but that any person who is interested in a judgment may compel the plaintiff to enter it up." [The issue roll not sealed is not a Record of the Court; Fagan *v.* Dawson, 4 Man. & G. 711.]

(*f*) *Vide supra.*

it, the copy cannot be received. Such a case happened when a paper purporting to be an office copy of a bill filed in the Exchequer in 1640 was offered; it was refused though an officer attended to prove that he had searched for the original without success. (*a*) A writer of high authority holds that a copy of a lost record may be admitted when it is, according to the rule of the civil law, *vetustate temporis aut judiciarid cognitione roborata*, but the cases in his margin do not bear out his position in the text. (*b*) The decision last cited may be taken as an authority against him, for it occurred in 1758, considerably more than a century later than the date of the record. (*c*) The copy in the printed statute book of the decree for tithes in London, (*d*) a very peculiar case, is adduced as in point, but it seems rather to have been admitted as forming, together with uniform usage under it, sufficient secondary evidence to presume that the original was regularly enrolled. (*e*) Still there is weight in the reason there given by C. B. Gilbert, "The record is in the custody of the law, and therefore, if lost, there ought to be no injury arising to the party's right." But the [113] insecurity against forgery is obvious. (*f*)

Fourthly, Records which relate to the Revenue, such as the greater part of those in the King's and the Lord Treasurer's, Remembrancers' Offices, (*g*) the Augmentation Office, the

IV. Records relating to the revenue.

(*a*) Lord Irwin *v.* Simpson, 7 B. P. C. 317, [*ut supra*, p. 158, n (*b*).]

(*b*) Gilb. on Ev. 23.

(*c*) [*Sed vide supra*, p. 163.]

(*d*) Subjoined to stat. 37 H. 8, c. 12.

(*e*) 1 Vent. 257; Macdougall *v.* Young, 1 Ry. & Mo. 393.

(*f*) [When the original judgment had been destroyed by fire, execution was allowed to issue on a verified copy; Cheesewright *v.* Franks, 6 Dowl. 471.]

(*g*) Vernon, in his "Considerations for regulating the Exchequer," p. 21, says, that the King's Remembrancer "maketh forth writs of *distringas* against all accomptants, whose names are to be entered upon the states of accomptants, as well the Master of the Horse, &c., and all receivers of the king's revenues, and other accomptants whatsoever, who are to make their accompts in the Exchequer, and against such as have money impressed to them for the king's special service, and the like; and [he is] to see issues returned against them until they shall perfect their said accompts before the several auditors thereto assigned, and to enter the same upon the roll of the States of Accomptants in his office; from whence the said accompts, after they are declared before the Treasurer and Barons of the Exchequer, and so entered as aforesaid, are also to be sent into the pipe, there to remain as *the king's and subjects' evidence upon record* for ever." [An ancient *extent* of crown lands, found in the office of Land Revenue Records, and purporting to have been made by the steward of the Crown lands, is evidence of the title of the Crown, to lands therein stated to have been purchased by the Crown of a subject; Doe d. Wm. 4 *v.* Roberts, 13 Mee. & W. 520, S. C. 14 Law J., N. S. 274. A *compotus* of a *prepositus*, or *reeve temp.* Hen. 6, was held admissible in evidence; Bunce *v.*

Chapter House of Westminster Abbey (which is sometimes called the Receipt of the Exchequer), &c., do not differ in any thing that regards Evidence from other Public documents. An account of them and of the places of their custody will be found in the Report on the Cottonian MSS. in 1733, and in the more recent labours of the Record Commission. It may be mentioned, under this head, that on account of the interest which the Crown has in the Duchy of Cornwall, all acts which affect the possessions or revenues of the Duchy are to be considered as Public acts; and, on this ground, a document produced from the King's Remembrancer's Office, purporting to be a caption of seisin taken to the use of the first Duke of Cornwall, by certain persons assigned by his letters patent to do so, was received in evidence to show the rights of the Duke. (*a*)

Documents of a Public nature, but not records.

There are many documents which, though they are not records, are comprehended under the second principle upon which copies become admissible primary evidence, namely that public convenience requires them to remain constantly at their proper depository. (*b*) Thus entries in the books of the Bank of England containing the transfers of public stock, &c. &c. ought to be proved by copies. (*c*) On a motion in the K. B.

Books of the Bank of England;

[114]

Thompson, 1 Carr. & M. 34. And a record of a presentment, *temp.* Ed. 3, as to repairing a bridge, *ratione tenuræ*, in Reg. *v.* Sutton Lady, 3 Nev. & P. 569. Also, the bill of cravings of a sheriff entered, allowed, and of record in the Exchequer; Rex *v.* Antrobus, 6 C. & P. 784.]

(*a*) Rowe *v.* Brenton, 8 B. C. C. 743. [Documents deposited in the office of H. M. Land Revenue Records and Inrolments (pursuant to stat. 2, Wm. 4, c. 1,) may be proved by examined copies, in a suit to establish the title of the Crown, or its lessees, to lands to which they relate; Doe d. Jones *v.* Robert, 13 Mees. & W. 520. So expired leases and an extent, although the leases had not been enrolled within six months, pursuant to stat. 10 Geo. 4, c. 50, s. 53. But a document produced from the Duchy Office, and purporting to be a survey, *temp.* Eliz. by T. N., deputy to the surveyor-general, and signed by persons described as jurors of the Court of Survey, who presented the boundaries, there being no inquisition nor commission for making it, although there appeared an order by the Queen for payment for making it, was held inadmissible; Evans *v.* Taylor, 3 Nev. & P. 174.]

(*b*) [It is sufficient to render a document admissible in evidence, so far as its coming out of proper custody is requisite, that it is produced from a place where it was likely to be, although that not the most proper; Croughton *v.* Blake, 12 Mees. & W. 205.

(*c*) Bretton *v.* Cope, Peake's Rep. 30; March *v.* Collnett, 2 Esp. 665; Man *v.* Cary, 3 Salk. 155, where a copy of a Bank bill was given, and the reason of its being received is said to be because the Bank is a Public body established by Act of Parliament for public purposes. [Unless, indeed, the very question itself be, whether the signature to a transfer or other entry is the genuine handwriting of A. B.; in which case, of course, the original book must be produced, as in Auriol *v.* Smith, 18 Ves. 198. But, at law, with a view to prove only the acceptance of

for a rule on the East India Company to show cause why they should not permit the original transfer books of their stock to be read, "the Court mentioned several instances where copies of matters not on record are admissible; as copies of Court rolls, Parish registers, &c., and gave a rule to show cause why copies of those entries should not be taken and read in evidence." (*a*) The Rolls of a Court Baron or copies of them are evidence, because they are the public rolls by which the inheritance of every tenant is preserved; and they are the rolls of the Manor Court, which was anciently a Court of Justice relating to all property within the district. (*b*) Thus also of the books which contain the official proceedings of Corporations; (*c*) and matters respecting their property, if the Public at large is concerned with it; (*d*) but they cannot be made evidence in favour of the Corporation itself. (*e*) Examined extracts from the Parish Register of christenings, marriages, and burials, are constantly used as evidence; (*f*) proof of identity is generally necessary

Books of the East India Company;

Rolls of a Court Baron;

Books of a corporation;

Parish registers;

stock, it was held that, in order to prove the identity of the party, a copy of the entry, and evidence of the handwriting, by a party who had inspected the entry itself in the Bank books was admissible, without producing the books themselves; Mortimer *v.* McCallan, 6 Mees. & W. 58.]

(*a*) Anon. 1771; Doug. 593, note.

(*b*) Gilb. on Ev. 76; Comb. 138: R. *v.* Lucas, 10 East, 235; R. *v.* Tower, 4 M. & S. 162. So of other inferior Courts, Comb. 337; but see Att. Gen. *v.* Lord Hotham, 1 T. & R. 217. [Copy of Court roll how proved, at law, see Doe d. Burrows *v.* Freeman, 1 Car. & K. 386. An examined copy of Court roll, for evidence, needs no stamp; ibid. Court rolls are evidence only against the tenants and Lord of the Manor. A mere recital of a surrender in the Record book of a Manor used as evidence of such in Rex *v.* Thurcross, 1 Ad. & El. 3, S. C. 3 Nev. & M. 268.]

(*c*) R. *v.* Haines, Comb. 337. [An entry of the admission of a person to the freedom of a City Company, in Collins *v.* Maull, 8 C. & P. 502, and an instance of a book being produced from the muniment room of the Corporation of London, see Bruin *v.* Knott, 12 Sim. 436.]

(*d*) Warriner *v.* Giles, Str. 954. [An ancient book out of the registry of a bishop may be used in evidence as to the endowment of a vicarage; but, regularly, a copy of an entry in it is not admissible. Woolley *v.* Bromhead, 1 M. & W. 321, S. P. 13 Price, 500. Nor is a copy of a terrier admissible; Leather *v.* Newett, 4 Price, 355. As to the Books of Bishopsgate, *vide infra*, Hearsay Books of Rectors, &c.]

(*e*) [Att. Gen. *v.* Warwick, 4 Russ. 222. As to the presumption of possession by new corporation of the books of the old one, see Ludlow Corp. of *v.* Charlton, 9 Car. & P. 242.]

(*f*) Gilb. on Ev. 76. [Lord Eldon observed however that, in claims of peerage, the Attorney General should not report upon any case to his Majesty without having seen and examined the original Register; Speech in the Chandos case, cited in Hubb. on Ev. of Succ. p. 86. In case of loss or destruction of the Parochial Registers, recourse may advantageously and properly be had to the copies deposited in the Bishops' Courts, see Walker *v.* Beauchamp, C. C. & P. 552, and Chandos Barony case, Min. Ev. As to the custody of the books, purporting to be the Registers, see Walker *v.* Wingfield, 18 Ves. 443; and as to this

Not other (so called) Registers.

Books of assessments;

at the same time. (*a*) But the book of Fleet marriages is no Register, not having been compiled under Public authority; (*b*) nor is a Register of baptisms in the Island of Guernsey sufficient evidence here of a party being of age. (*c*) A copy of entries in books of assessments by the commissioners of the

and all other such matters relating to them, the reader will do well to refer to Mr. Hubback's work, part 3, c. 1, p. 479. With regard to the memorandum books, registers (so called) of baptisms, &c., kept in dissenting meetings, copies of such are not evidence. In the Ecclesiastical Court it was observed, *per* Sir John Nicholl, "This is not evidence that can be admitted. The Court can only admit copies of public documents which are in official custody. Extracts from a register of this description must be considered as mere memoranda. The books themselves, however, may be produced at the hearing of the cause, and be made evidence to a certain extent; by this means the party will have the benefit of them, though in a different manner from that in which they have now been offered; Newman *v.* Raithby, 1 Phill. R. 315. So, in a case in Chancery, an entry of a birth of a dissenter's child in a register, kept for the purpose at a public library, held to be no evidence; *ex parte*, Taylor, 1 Jac. & W. 483. And to the same copious well-spring of information, referred to above, the reader will do well to turn, for particulars he may require, as to all the Dissenters' and other "non-parochial registers," (so called,) Hub. on Ev. of Succ., Part III. c. 11, p. 503. But with a *caveat*, nevertheless, lest he should be (as he well may be) misled, and draw an inference respecting these "memorandum books," as Sir John Nicholls, in the case above cited, calls them, as though the late stat. 3 & 4 Vict. c. 92, had actually made all of them, and all the trash therein contained, as well as the sound matter, equally receivable in evidence. Let him first note, in sec. 6 of the Act last mentioned, the words "subject to the provisions thereinafter contained," words qualifying the enactment very materially, and then turn to sections 18 and 19, and, lastly, inquire particularly whether the "Rules" therein directed to be made, have ever been so made; *Semble*, they have not.

A paper purporting to be an extract from the register of marriages at Barbadoes, and certified as such by the rector of the parish there, his signature being verified by a notary of Barbadoes, but not having been collated with the register, still in existence, was, in the Ecclesiastical Court, held to be inadmissible, as evidence of a marriage; Coode *v.* Coode, 1 Curteis, 765, but see 768.

In the absence of proof that registers of episcopal chapels at Edinburgh, are, by the law of Scotland, documents of an authentic and Public nature, copies thereof were also rejected, by the Ecclesiastical Court, as inadmissible, by the law of England; Conway *v.* Beazley, 3 Hagg. R. C. 51. An attested copy of an entry in the book kept at the British Ambassador's hotel in Paris, wherein his Chaplain makes and subscribes entries of all marriages of British subjects solemnized by him; such book not having the authenticity of a Parish register, was held not admissible to prove a marriage; in the Athlone Peerage case, 8 Cl. & Fin. 263. And (by the way) it may here be noted that the certificate of baptism by a Romish priest is not evidence at law; D'Aglee *v.* Fryer, 13 Law J., N. S., R. 101. Nor, *semble*, would be one of circumcision by a Jewish rabbi; see Davis *v.* Lloyd, 1 Carr. & K. 275. And it may be as well to add, that a copy (certified under 6 & 7 Wm. 4, c. 86) of the Register of deaths is not sufficient evidence to ground an order for payment of money out of the Court of Chancery; see Att. Gen. *v.* Culverwell, and Leach *v.* Leach, cases fully cited in Hub. on Ev. of Succ., App. No. 13, p. 764.]

(*a*) [The subject of proof of identity has been elaborately treated by Mr. Hubback in his learned work, on Ev. of Succ.; *vide* Index, *voce* Identity.]

(*b*) Lord Eldon in Lloyd *v.* Passingham, Coop. 155, [S. C., 16 Ves. 59. And so Doe *v* Gatacre, 6 C. & P. 578, and stat. 3 & 4 Vict. c. 92, s. 6 and s. 20, expressly excepts this and some other such.]

(*c*) Huet *v.* Le Mesurier, 1 Cox, 275.

Land tax, or of a Poor rate, is admissible, on the same principle. (*a*) In the same manner examined copies of entries in the Council of State's Office are good evidence; (*b*) and in short, the rule may be considered as settled that every document of a Public nature which there would be an inconvenience in removing, and which the party has a right to inspect, may be proved by an examined copy. (*c*)

Land tax or Poor rate.

[115]

State Papers.

Other Public documents.

Public documents which are kept in public repositories for general use may be inspected and copied on paying the regulated fees of the office. The records of the King's Courts, "for that they contain," as Lord Coke says, "great and hidden treasure, are faithfully and safely kept, (as they well deserve) in the King's treasury; (*d*) and yet not so kept but that any subject may for his necessary use and benefit have access thereunto; which was the ancient law of England, and so is declared by an act of Parliament, in 46 Edw. 3." (*e*) As far as the rules of evidence are concerned, it will be sufficient if the officer charged with the custody of Records do on his own sole authority allow inspection and give a copy, or produce the original in Court; but Lord Ellenborough said it was very clear that "it is the duty of the officer not to produce a Record but upon competent authority, which, with respect to the general Records of the Realm, is obtained upon application to the Attorney General," who grants his fiat. (*f*) A party who wishes to

Means of inspection and copies of Public documents.

Records.

Proceedings

(*a*) R. *v.* King, 2 T. R. 234, [and see Doe *v.* Arkwright, 3 Nev. and M. 731, what may be proved thereby.]

(*b*) Eyre *v* Palsgrave, 2 Camp. 606.

(*c*) See Phil. on Ev. 404, and the numerous instances contained in the same chapter. [And on the other hand the documents must be of a Public nature duly recognised; *vide supra*, p. 166, n. (*b*). A case where copy of an ancient grant in the chartulary of an abbey had been received in evidence, see Williams *v.* Wilcox, 3 Nev. & P. 606. But as to a monastic record, in the possession of the College of Heralds, being evidence, see Lygon *v.* Strutt, 2 Austr. 601. As to monastic and other records and documents of use as evidence, see also in Hubb. on Ev. of Succ., Part 3, ch. 6, *et seq.*, much valuable matter.]

(*d*) "A Fine is considered perfect when it has passed the King's Silver Officer. That office therefore is the proper place to search for Fines.—Search may also be made at the Chirographer's office, where the names, counties, and places are entered; but the books there go no further back than the reign of G. III. The Fines from the end of R. I. to the end of G. II. are in the Chapter House Westminster, regularly arranged according to the year, term, and county; in the earlier reigns the boundaries of the lands are frequently given." Coventry on Conveyancers' Evidence, p. 75. [The use of such a search, see Hubb. on Ev. of Succ. 222.]

(*e*) 3 Co. Rep. Pref. 3.

(*f*) Legatt *v.* Tollervey, 14 East, 306. [And now, as to the custody of Records, see stat. 1 & 2 Vict. c. 94.]

of inferior Courts.

inspect the proceedings of any inferior Court should apply first to that Court, and on his showing that he has some interest in the document and that he asks for it for a proper purpose, it will be given to him. If it should be refused, (*a*) the Court of [116] Chancery may at any time send by a writ of *certiorari* either for the record itself or an exemplification. (*b*) The Court of Queen's Bench has the same power by *mandamus*, and frequently exercises it. It did so when a plaintiff who had been sued in the Court of Conscience in London moved for liberty to inspect the book of proceedings, to assist him in an action for false imprisonment; his motion was granted, upon the ground that every man has a right to look into the proceedings to which he is a party. (*c*) But the same Court refused when a tenant of a Manor applied for an inspection of the Court rolls, without suggesting any reason for his demand, for it appeared that in all former cases there had been some cause or proceeding instituted in which the applicant was or might be involved. (*d*)

Court rolls of a Manor.

Other Public documents.

For an inspection of other public documents an order will be granted on the same principles. (*e*)

Documents. *Quasi*, Public.

But there are some, belonging to Courts and to bodies of individuals, which partake both of a public and a private character, and are treated as the one or the other according to the relation in which the applicant stands to them. Thus the books of a corporation are public with respect to its members, but private with respect to strangers. (*f*) There is a little difference to be noted here in the practice of the Courts. (*g*) Lord Hardwicke (*h*) says, "It has been refused at law to inspect into

Books of a corporation, as to the members.

(*a*) The prior application and refusal should always be shown by affidavit; Roe *v.* Aylmer, Barnes, 236.

(*b*) *Vide infra*, P. III. ch. 1, § 2.

(*c*) Wilson *v.* Rogers, 2 Str. 1242. The Old Bailey Court restricts this right; see 1 Phil. on Ev. 405.

(*d*) R. *v.* Allgood, 7 T. R. 746. And see Herbert *v.* Ashbourne, 1 Wils. 297; R. *v.* Sheriff of Chester, 1 Chit. Rep. 479.

(*e*) [As to the exercise of this power, in cases of Parish Registers, see Dormer *v.* Ekyns, 2 Barnard, 269; *et vide supra*, p. 167, n. (*f*).]

(*f*) [For example, the books of the Universities, as to the Masters and Scholars of the same are public, as to all others, though nominally and to a certain extent actually members, are private; and so those of the Colleges and Halls in each. The original book of one of the Universities was produced in the Tracey Peerage case, Min. Ev.: *et vide supra*, p. 167, n. (*c*); and consult Hubb. on Ev. Succ. Pt. III. ch. 4, p. 528, *et seq*, as to registers of this class.]

(*g*) [*Vide supra*, p. 7, n. (*e*).]

(*h*) In —— *v.* Corp. of Exeter, 2 Ves. 620.

corporation books, and rightly; because Courts of law will not give that liberty to any one who has not some right or claim to it, being a member of the Corporation: so as to a manor, in a question between lord and tenant a Court of law will give liberty to inspect books of the Court rolls, but not in a question between a lord of one manor and a lord of another: yet on a bill in this Court for a discovery, this Court will grant it." But the last sentence is explained by Lord Kenyon to mean that "a Court of Equity will examine into cases of this kind when the application is made, and adapt its rules to the individual case in the manner best calculated to attain the ends of justice." This was in a case where the subject was well sifted, and Lord Kenyon, (overruling some recent decisions which had been made upon a mistaken view of the practice in equity, (*a*)) refused leave to the defendant to inspect the title of the corporation to certain tolls which they claimed. (*b*) Yet in an action for the breach of a bye-law, restraining persons from exercising trades within the limits of a corporate city, unless they became freemen, the Court of King's Bench allowed the defendant to inspect the bye-law, considering him, as an inhabitant, interested in the local laws. (*c*) Parish books are, in the same manner, open to the parishioners: (*d*) but when a person, (the impropriator of the tithes), brought an ejectment to recover a house reputed to belong to the parish, the Court would not make an order for him to inspect the parish books. (*e*) So the East India Company have been compelled to allow a holder of stock, inspection of their transfer books, (*f*) but not of their private books of letters nor of books relating to their appointments. (*g*) In like manner inspection of the Public Lottery books was granted to a ticket holder. (*h*) But the Court will exercise a

Books of a Manor, as to the Lord or a tenant.

[117]

Books of a corporation,

as to other persons if interested.

Parish books.

Transfer books of the East India Company.

Lottery books.

(*a*) [*Vide supra*, p. 7, n. (*e*).]

(*b*) Mayor of Southampton *v.* Graves, 8 T. R. 590; where the Mayor of Lynn *v.* Denton, 3 T. R. 303, and other cases are referred to.

(*c*) Harrison *v.* Williams, 3 B. & C. 162. [Public books, as those of a manor, ordered to be produced, but not books in private hands; Anon. 2 Ves. 578.]

(*d*) [As to entries in Parish books, *vide supra*, p. 167, and notes, *et vide infra*. As to the right of access to such, see Ward *v.* Pomfret, 5 Sim. 475, and Dormer *v.* Ekyns, 2 Barn. 269, cited above.]

(*e*) Cox *v.* Copping, 5 Mod. 396.

(*f*) Gery *v.* Hopkins, 7 Mod. 129.

(*g*) Shelling *v.* Farmer, 1 Str. 645; Murray *v.* Thornhill, 2 Str. 717.

(*h*) Scinotti *v.* Bumstead, Tidd's Pr. 531.

Exciseman's books.

discretion; therefore when an action was brought on an idle wager respecting the amount of one branch of the revenue, the excise officer was not obliged to produce his books. (*a*)

Books of the Bank of England.

At the Bank of England the books are allowed to be inspected for the purposes of an investigation in a suit, on production of a certificate from the Master stating that it is requisite; otherwise it would be necessary to file a bill. (*b*)

[118]

Private documents;

With respect to private documents, we have already seen how, and under what restrictions, their production may be enforced—if they are in the hands of a defendant, (*c*)—or of a witness. (*d*)

how proved.

Letters and papers of which the identity, and deeds of which the due execution, is admitted, require only to be handed in—that is, taken to the registrar and entered in his book. (*e*) But when the identity, or the execution has not been admitted, they must then be placed in the hands of witnesses and proved. (*f*)

Notice to the other side to produce.

There is a rule, at Law, that a [deed or other] document to which a party to the suit is a party, and under which he claims a beneficial interest, will, at the trial, after a notice, (*g*) be taken,

(*a*) Atherfold *v.* Beard, 2 T. R. 610.

(*b*) See Brace *v.* Ormond, 1 Mer. 409.

[As to the Bank of England, *vide supra*, p. 46, n. (*e*). The List at Lloyd's (a coffee-house, next the Royal Exchange, London, the subscribers to which are underwriters and insurance brokers) may be evidence against an underwriter, a subscriber, who has access, and is therefore deemed to be aware of its contents; see Macintosh *v.* Marshall, 11 Mees. & W. 116.]

(*c*) [And the plaintiff have a right, &c.] *vide supra*, p. 30, *et seq.* [As to this subject, see also the Chapter on Production of Documents, by Mr. Headlam, in his edition of Dan. Ch. Pr., Vol. 2, Pt. II. p. 1661.]

(*d*) [And the witness no power to refuse, &c.], *vide supra*, p. 64, n. (*a*), *et* p. 107.]

(*e*) [At the hearing, *vide infra*, as to entering evidence.]

(*f*) [In general, maps, plans, drawings, models, and other things of a like nature, exhibited to the Court by way of evidence, and not admitted by the other side, are identified and proved as exhibits by the witnesses, by the depositions or by affidavits, according to the nature of the proceedings; *e. g.* in a suit, in the depositions, on a motion, or petition in a suit, by affidavits, *vide supra*, p. 146-7. Where the circumstances under which an annuity deed was executed (charging the wife's separate interest) were disputed, the Court of Exchequer refused to allow it to be proved *viva voce* as an exhibit; but gave leave to file interrogatories, for that purpose: to give opportunity for cross-examining the subscribing witnesses; Maber *v.* Hobbs, 1 Younge, 585. But where the validity only and not the execution of a deed is questioned in the suit, it may be proved *viva voce* at the hearing; Att. Gen. *v.* Pearson, 7 Sim. 309; see also Att. Gen. *v.* Shore, ibid. 309, n. And note, although by express agreement a copy is admitted to be a true copy, the necessity of proving that the original, whereof it is a copy, was duly executed may still remain; Mounsey *v.* Burnham, 1 Hare, 15.]

(*g*) Unless this notice has been given two days before the trial, the defendant may show the deed in Court without allowing inspection of it; see 1 Phill. on Ev. 425; and see Doe d. Haldane *v.* Harvey, 4 Burr. 2484.]

primâ facie as against that party, to be well executed and valid. (*a*) And in Equity this rule holds good to its full extent as regards a document in the hands of a plaintiff. But it holds good to a limited extent only as regards a document in the hands of a defendant; for it can apply only to those documents of which the plaintiff has been entitled to call for an inspection, but which the defendant has stood upon some privilege of withholding. (*b*) Where, however, from the nature of the proceeding, the party must know that the contents of a written instrument in his possession will come into question, it is not necessary to give any notice for its production. (*c*)

Mode of Proof, by witnesses.

The mode of proving documents by means of a witness is either by the ordinary examination on interrogatories which we have described above, [by affidavit] (*d*) or by the *vivâ voce* examination at the hearing which will be described in the next section. (*e*)

[119]

Necessary testimony; deed or

The testimony necessary for proving the execution of a deed (*f*) or any other attested instrument, is (wherever

(*a*) See 1 Phill. on Ev. 432. The rule was laid down too broadly in R. *v.* Middlezoy, 2 T. R. 41, and followed in Bowles *v.* Langworthy, 5 T. R. 365, but denied in Gordon *v.* Secretan, 8 East, 548; but re-established, with qualifications, in Pearce *v.* Hooper, 3 Taunt. 60; Orr *v.* Morris, 3 Bro. & Bing. 139; Burnett *v.* Lynch, 5 B. & C. 589; Doe d. Tyndal *v.* Heming, 6 B. & C. 28. Yet see 1 Stark. on Ev. 351.

[When, in ejectment, both parties claimed under a lease, produced by the defendant on notice; held that the plaintiff was not bound to prove it; Doe *v.* Wilkins, 5 Nev. & M. 434. As to the notice to be given to the other party to produce a document proved to be in his custody or power or in default to admit secondary evidence thereof; *vide infra*, Secondary Evidence.]

(*b*) This is almost the only point in which the proof of deeds in Equity differs from that of Law, and as Mr. Starkie's and the other treatises, are full on the general subject, the author has thought it better to give little more than the heads in the pages which follow.

(*c*) Wood *v* Strickland, 2 Mer. 465.

(*d*) [By the Order of 26th Aug. 1841, No. 43; Sand. Ord. 886, *ut supra*, p. 147.]

(*e*) [Documents should come out of proper custody, to render them admissible in evidence; Doe d. Egremont E. of, *v.* Pulman, 3 Ad. & E 622; Davies dem. Lowndes ten. 7 Scott, N. R. 141; Doe d. Blayney *v.* Savage, 1 Car. & K. 487. But it is not necessary (even at law) that they should come from the *most* proper place of custody; it is sufficient if they come from a place where they may reasonably be expected to be found; Croughton *v.* Blake, 12 Mee. & W. 205; 13 Law J., N. S. 78; 8 Jur. 275.

No will can be proved *vivâ voce* or by affidavit at the hearing; Eade *v.* Lingood, 1 Atk. 293, *et vide infra*, Wills.]

(*f*) [Where a deed was proved by the attesting witness at the hearing *vivâ voce*; held to be so for all the purposes of the cause unless impeached; Bowser *v.* Colby, 1 Hare, 109.

As to the witnesses to deeds generally, see Co. Litt. 66, and the Index to the Arrangement of Co. Litt. by Thomas, *voce* Deed, will direct the reader to all the necessary learning. As to deeds of conveyance, the transfer of property was intended to be simplified by the stat. 7 &

any attested instrument by the oath of a subscribing witness,

possible), the oath of the subscribing witness. (*a*) "This is a general rule, as fixed, formal, and universal as any that can be stated in a Court of Justice." Lord Ellenborough, who so expressed himself, was pressed with arguments that the reasons of the rule did not apply to collateral issues, but he pronounced it "a clear, established, rule of law, that a party who would prove the execution of any instrument that is attested, must lay the groundwork by calling the subscribing witness to prove it, if he can be produced and is capable of being examined. (*b*)

if possible.

8 Vict. c. 76, amended and partly repealed by stat. 8 & 9 Vict. c. 106, passed with like intent: Acts which perhaps claim to be noticed; but to refer more particularly to them would be hardly pertinent, and of little use, as Lord Brougham and Vaux has now (March, 1846) lately given notice of an intention to bring in another Act, to amend these Acts!

Formerly, at law, in pleading a conveyance by lease and release, *profert* of the latter was essential; see Dr. Leyfield's case, 18 Rep. 92; and Jenkins *v.* Pearce, 6 Mee. & W. 722, and S. C. 8 Dowl. 758. But now, as to this, see the stat. 4 Vict. c. 21, "for making a release as effectual as a lease and release between the same parties."]

(*a*) When certain forms are prescribed by a power, it is necessary to prove a strict adherence to them in every particular; see Sugden on Powers, ch. 5. [Where a power is to be executed by deed "attested," the deed purporting to execute the power, cannot be proved *viva voce*, at the hearing; Brace *v.* Black, 7 Sim. 618. Where the deed is to be attested by "credible witnesses," and is attested by the wife of an appointee, it will be held invalid; Perry *v.* Watts, 4 Sc. N. S. 366. The word "attest" implies attestation by a witness; a power to demise with consent of a party "duly attested" was held, therefore, not well executed by a recital, in the indenture of demise, of such a consent, and of its being testified by his being a party to the said indenture; Freshfield *v.* Reed, 9 Mees. & W. 404. And here note (by the way) that the attesting witness to an insolvent's petition for protection, under the stat 5 & 6 Vict. c 116, need not be called to prove the petition at law; see Bailey *v.* Bidwell, 13 Mee. & W. 73; 2 Dowl. & L. 245; 13 Law J., N. S. 264; *sed secus*, an attesting witness to a submission to an award; Berney *v.* Read, 14 Law J., N. S. 247; 9 Jur. 620.

As to refreshing the memory of an attesting witness to a deed, see Wood *v.* Cooper, 1 Carr. & K. 645.]

(*b*) [This results from the very nature of the thing, which (unless purporting to be above thirty years old, as to which, *vide infra*,) does not by mere inspection satisfy the Court that it is a deed at all. Even where the defendant did not claim, under the deed, any beneficial interest, in the subject-matter; held, that the deed required proof by attesting witnesses; Reardon *v.* Minton, 5 Man. & Gr. 204; 6 Scott, N. R. 237. Rule recognised in Bell *v.* Clayton, 1 Car. & K. 162. The very fact of having the execution attested by witnesses (not being essential to it as a deed) is in order that its execution may be proveable by them, if living, at any time less than thirty years afterwards. After thirty years the party is not set to find out even whether the witnesses are living; the deed then proves itself. Where the name of a witness to a document was not written by himself but by another person, and in pencil merely; held (at law) that it was not *primâ facie* evidence that he was an attesting witness, so as to render it necessary to call him; and therefore that the signatures of the parties might be proved by other evidence; Cassons *v.* Skinner, 11 Mee. & W. 161; 12 Law J., N. S. 347.

Where a deed executed by a corporation had a memorandum written on the paper to which the seal was affixed, purporting that it was sealed by order of, &c., which memorandum was subscribed "A. B., Secretary;" this was

His testimony indeed," he continues, " is not conclusive, for he may be of such a description as to be undeserving of credit, (*a*) and then the party may go on to prove him such, and may call other witnesses to prove the execution. The cases have even gone the length of punishing the witness criminally. But here the only question is whether the parties who seek to prove the execution of this indenture, must not make their way to what may be called secondary proof through the medium of those witnesses who are the plighted witnesses to the transaction, by first disposing of their testimony." (*b*) Lord Mansfield quotes Sir Joseph Jekyll as the first who allowed other witnesses to be examined when the attesting witness denied the deed; afterwards it became common. (*c*) An admission made distinctly for the purposes of the suit (*d*) will supersede the necessity, (*e*) but

Testimony not always sufficient proof.

Admissions.

[120]

held not to be an attestation, but merely a memorandum that the act was done, by the order, &c.; Doe d. Bank of England *v.* Chambers, 4 Ad. & Ell. 410; and S. C. 6 N. & M. 539; and see Doe *v.* Penfold, 8 C. & P. 536: but see, however, Poole *v.* Warren, 3 Nev. & P. 693. What is, at law, sufficient proof of a witness being abroad, to let in evidence of his handwriting, see Davids *v.* Carr, 2 Dowl. N. S. 1034; 12 Law J., N. S. 312, and 7 Jur. 379. Where an attesting witness to a deed has lived abroad, the Court requires stricter proof of his death, than when he has been constantly residing in England; Henley *v.* Philips, 2 Atk. 48. [And as to evidence of Identity and Death, see Hubb. on Ev. of Succ., where a mass of most useful learning is collected.

The attesting witness having become blind, is no ground for dispensing with his attendance, as he may from recollection give material evidence, as to the transaction; Crank *v.* Frith, 2 Moo. & R. 262; 9 Carr. & P. 197.

Where the attesting witness says the signature is his handwriting, and that he should not have signed the attestation if he had not seen the deed executed; held sufficient, although he added that he had no recollection of the transaction: where the attestation was by marks, and the daughter proved that persons of the name lived in the neighbourhood and could not write, and that they were dead, and that there were no others of the same name, it was held sufficient evidence of their identity; Doe d. Counsell *v.* Caperton, 9 C. & P. 114.]

(*a*) [For observe, even the stat. 6 & 7 Vict. c. 85, intituled " An Act for improving the Law of Evidence," suggests that interest of a defendant examined as a witness, although to be no " just exception to his testimony" may " be considered as affecting or tending to affect" his credit. *A fortiori* as to the objections worse than interest, *vide infra.*]

In ancient times the witnesses assisted greatly to give weight and credit to the instrument.

" By the laws of the old Germans and French, both of which we imitated, witnesses unto deeds ought to be of the nobler sort, and free birth, which well appeareth in the *Teste* of our deeds in all ages." Spelman's Works, p. 256. The *Teste Me ipso* of our king, Rich. 1, will occur to the reader.

(*b*) R. *v.* Harringworth, 4 M. & S. 350.

(*c*) Abbot *v.* Plumbe, 1 Doug. 216; Talbot *v.* Hodson, 7 Taunt. 251.

(*d*) [As to admissions relative to documents in general, *vide supra*, p. 11, n. (*e*); as to admissions and waivers of proof, *vide supra*, p. 47, *et seq.*, and as to such as may preclude the necessity for producing a subscribing witness, *vide supra*, p. 49, n. (*b*), and cases there referred to.]

(*e*) Gilb. on Ev. 105. [And as to this see last note.]

otherwise an admission even in an answer to a bill of discovery is not more than secondary evidence, and cannot be received unless due diligence has been used to procure some account of the witness. (*a*)

One witness as to deeds, &c.; all as to wills.

In Equity the testimony of one attesting witness where there are several, is sufficient, except for the proof of wills. (*b*)

The methods by which the want of this, the usual and proper [evidence of a deed, will, or other exhibit of an attested nature] may be supplied, will be more conveniently discussed in the second Part of this work, under the head of Secondary Evidence. (*c*)

As to deeds; what facts are to be proved,

The essential facts to which the witness must speak in proving the execution of an ordinary deed, are,—that it was delivered: (*d*)—that at the time of delivery it was sealed;—and the identity of the person who delivered it. (*e*)

as to delivery;

There is no particular form of delivery; "*in traditionibus scriptorum non quod dictum est, sed quod factum est, inspicitur;*" a word or a gesture has been held sufficient. (*f*) The following are two of C. J. Hale's MS. notes on the subject; (*g*) "The obligor seals obligation and throws it down upon the table, without other circumstances; this is not a delivery: but if he throws it towards the obligee, or if the obligee immediately takes it up, and the obligor says nothing, it is a delivery."

(*a*) Call *v.* Dunning, 4 East, 53; where Mr. J. Le Blanc says, that although the party has thus the advantage of giving his own account of the transaction, yet he is entitled to avail himself of all the knowledge of the attesting witness, who may be aware of facts not within the knowledge of the party who signed; [and see Grayson *v.* Wilkinson, Dick. 158.]

(*b*) [As to which,] *vide infra.*

(*c*) *Infra*, P. II. ch. 3, § 2. [As to what is *primâ facie* evidence only, although not merely secondary evidence. A bond or mortgage deed, being proved, is *primâ facie* good evidence of a debt; but in case of fraud appearing, actual payment should be proved; Piddock *v.* Brown, 3 P. Wms. 289. In all cases a receipt is only *primâ facie* evidence, which admits of explanation; Farrar *v.* Hutchinson, 1 P. & D. 437.]

(*d*) [Where a deed appears to have been duly signed and sealed and is attested, the delivery will be inferred to have taken place, although the attesting witness, speaking positively as to the signing, cannot remember as to the other requisites; Burling *v.* Paterson, 9 C. & P. 570.]

(*e*) [A witness to a deed must prove not only his own attestation but the execution; Hill *v.* Unelt, 3 Mad. 370. Witness to a deed must state the circumstances of the execution, the sealing and delivery; Burrowes *v.* Lock, 10 Ves. 470. Though indeed sealing and delivery may be presumed from handwriting; S. C.]

(*f*) Thoroughgood's case, 9 Rep. 137 *a*; Co. Litt. 36 *a*. See Eaton *v.* Scott, 6 Sim. 31.

(*g*) In Hargr. & Butler's Co. Litt. 36, *a*.

"If Dean and Chapter seal a deed, it is their deed immediately; but if at the same time they make letter of attorney to deliver it, this is not their deed till delivery." (*a*)

as to sealing;

Sealing has now become so mere a matter of form, that, although it is retained as a ceremony adding something of solemnity to a deed, the slightest evidence or presumption will suffice to prove it. (*b*) If the witness who saw the delivery can say that the deed had a seal on it at the time, it is enough. If a party affixes a seal for himself and others who are present and consent, it is binding on them all. (*c*)

[121]

as to identity;

The identity of the party ought to be proved, for it is obviously one of the most essential parts of the transaction. (*d*) That he called himself, or was introduced by the name which he signed, is not sufficient, if the witness did not know him personally. (*e*)

as to signing;

Signing [as to a deed which is essentially under seal] is not ordinarily essential, (*f*) but it is always as well to prove it, as a regular part of the transaction. Besides, it assists the other parts of the proof of execution, for the circumstance that the party has written his name opposite to the seal, on an instrument bearing on its face a declaration that it was sealed by him, is *primâ facie* evidence of sealing and delivery. (*g*) Where a

(*a*) [So of other corporations, *et vide* Doe d. Bank of E. *v.* Chambers, 4 Ad. & Ell. 410, *supra*, p. 174, n. (*b*), as to such.]

(*b*) [Now that it is no longer the only mode of signature; as formerly it was, when seals were the best evidence. For example, the concluding clause of the first Great Charter of King Henry 3, runs thus: "And because we have not as yet any seal, we have caused the present Charter to be sealed with the seals of our venerable father the Lord Gualo, &c.; and of William Marshall, Earl of Pembroke, the guardian of us and our kingdom, at Bristol, the twelfth day of November in the first year of our reign." See an Essay on Magna Charta, &c., by Richard Thomson, p. 116; a work combining the results of much research and taste. As to seals our Sovereigns, see Co. Litt. 7 *a*.]

(*c*) Ball *v.* Dunsterville, 4 T. R. 313; Lord Lovelace's case, Sir Wm. Jones, 268, there cited. [And the very important instance cited above, in n. (*b*). See also in the Essay there referred to, p. 17, another instance, amongst many of less note. *Semble*, the affixing of the Great Seal, or any other official seal, is an analogous case; and so the signature "by order" of a secretary of state, or other secretary; for "*Qui facit per alterum facit per se*," is a maxim.]

(*d*) [On the proof of identity in general, see much valuable information in Hubb. on Ev. of Succ., Pt. 2, ch. 6, p. 438.]

(*e*) Bull. N. P. 171; Nelson *v.* Whittal, 1 B. & A. 21; Parkins *v.* Hawkshaw, 2 Stark. Rep. 239.

(*f*) Taunton *v.* Pepler, 6 Mad. 166.

(*g*) Lord C. J. Gibbs, in Talbot *v.* Hodson, 7 Taunt. 251.

power required signing in the presence of witnesses, and a deed appeared and purported to be regularly executed, but the form of the attestation was only the usual one, "Sealed and delivered," &c., Lord Eldon said "there would be a miscarriage in a Judge directing a jury not to presume that the deed was signed in the presence of the same witnesses as it professed to be." (*a*)

Instrument not sealed.

When the instrument is not under seal, it becomes necessary to prove the signature of the party, that is, that it was actually signed by him or by some one in his presence at his request, or that he acknowleged or adopted it. (*b*) Lord Hardwicke says, "In the case of a note or declaration of trust, or any other instrument not requiring the solemnities of a deed, but bare
[122] signing, if that instrument is attested by witnesses, proving that they were called in, and that he took that instrument, and said that it was his hand, that would be a sufficient attestation of signing by him: that is the rule of evidence. (*c*)

Wills.

A will devising real estate must be itself produced in Court (*d*); a probate copy is [wholly] insufficient, because the Spiritual Court has no power to authenticate any such devise, and all the proceedings, as far as they relate to lands are, [absolutely null and void being] *coram non judice.* (*e*)

(*a*) M'Queen *v.* Farquhar, 11 Ves. 478.

(*b*) Wallis *v.* Delancey, 7 T. R. 266, note (*c*); and see Helmsley *v.* Loader, 2 Camp. 451; Levy *v.* Wilson, 5 Esp. Rep. 180; Jones *v.* Mars, 2 Camp. 305. [*Et vide supra*, p. 177, n. (*c*).]

(*c*) In Grayson *v.* Wilkinson, 2 Ves. 457; Dick. 158. [As to the necessity for the proper stamp to instruments tendered in evidence, *vide infra*; and that the objection is not removeable by waiver on the part of the other side, *vide supra*, p. 49, n. (*c*). As to secondary evidence when instruments are lost, &c., *vide infra*.]

(*d*) The Court will, if necessary, make an order on the officer of the Ecclesiastical Court, who has the custody of a will to deliver it, for the purposes of the suit, to a party who gives security to restore it; Lake *v.* Cansfield, 3 B. C. C. 263. [In the Chancery of Ireland also, "all wills to be proved are to be produced in the custody of the proper officer; and delivered to the examiner, or commissioners, and by them re-delivered to the same officer after examination closed; Gen. Rule, 19 Feb. 1803; 1 Sch. & L. 114.] If the production of the will has been omitted, the registrar will not draw up the order, and the cause must come on again at some future day that the will may be brought into Court.

(*e*) Bull. N. P. 245. See Gibson *v.* Whitehead, 4 Mad. 245. [That the probate copy is not conclusive evidence of the fact of a will or codicil taking effect, see Sinclair *v.* Ann, 6 Ves. 607; nor any evidence at all that copyholds pass by it; Jervoise *v.* Northumberland D. of, 1 Jac. & W. 570. Where a married woman makes a (so called) will, (or rather an appointment of a testamentary nature) under a power given to her by her husband; proof of such (so called) will *per testes* is sufficient

In a suit to establish a will, against the heir-at-law;

And when the object of the bill is to establish the will, (*a*) it is necessary that the heir-at-law should be a party, (*b*) for a decree in support of the will is final and conclusive against the heir, against whom an injunction would be granted if he should proceed to disturb the possession after the decree. (*c*) If the heir-at-law has been sought for without success (*d*) the Court cannot declare the will well proved, but will establish it so far only, as is necessary for the purposes of the suit. (*e*)

without other proof; Batch *v.* Wilson, Pr. Ch. 84; and see Platt *v.* Routh, 6 Mees. & W. 756, and S. C., on appeal, wholly ousting the jurisdiction of the Ecclesiastical Courts as to mere appointments.]

(*a*) [Though it may sometimes be proper to prove a will of lands in a Court of Equity, yet the same is not absolutely necessary, any more than to prove a deed; Cotton *v.* Wilson, 3 P. Wms. 192 It would seem that a will of personalty, as such, is proved in the Ecclesiastical Court, to prove that the ordinary has no further right, as to administration; and, by the grant of probate, acknowledges it.]

(*b*) [But, by an Order of 26th Aug. 1841, No. 31, "In suits to execute the trusts of a will it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party when he desires to have the will established against him;" Sand. Ord. 883.]

(*c*) Lord C. J. Tindal, in Tatham *v.* Wright, 2 Russ. & M. 13. [But as to the right of the heir to an issue, and to be disinherited "by verdict only," see *dictum per* Lord Eldon, in Bootle *v.* Blundell, 19 Ves. 504, and *vide infra*, p. 184.]

(*d*) [That is the particular heir-at-law, as respects the particular lands, &c. in question; whether heir general, or according to the custom, and, in each case, whether *ex parte paterna* or *ex parte materna*, and so on; a distinction as to lands, &c., which may have been overlooked by the Court, as well as the parties, in certain cases, especially those prior to the stat. 3 & 4 Wm. 4, c. 106, "for the amendment of the law of inheritance." In all suits when a will is to be established, it appears that, in strictness, the first inquiry should be, how the testator acquired each part of his real estate; if by descent, from what ancestor or relative, and how related to him. These facts being ascertained, consideration would guide the Court to the next inquiry, whether the person or persons, heir or co-heirs on the side and in the direction of those ancestors respectively, were before the Court. In some cases, the testator being legitimate, several different persons are his heirs or co-heirs, as to different estates. It would be impertinent, and seem presumptuous to follow out this subject in this place; but suffice it, the will to be established so as to give strength to the title of the devisees of each particular portion of the testator's property, must be proved against the right person, who, but for the devise, would have been heir as to that estate; and not merely against the heir general or co-heirs general of the testator, who may have no interest at all in that estate: as, *e. g.*, when an estate has descended from the mother, and the heir general is (as now it may be) the father! As to heirship, see the Inheritance Act, and Hubb. on Ev. of Succ.]

(*e*) Stokes *v.* Taylor, Dick. 349; Binfield *v.* Lambert, Dick. 337; French *v.* Barron, 2 Atk. 120; [Mullins *v.* Pratt, Bunb. 6. In a suit to have a will established and the trusts performed, the bill being dismissed as against the heir, the Court did not establish the will, but made a decree affecting the personal estate only; Drayson *v.* Peacock, 4 Sim. 283. In a suit to establish a will and have the trusts performed, a person had alleged himself to be heir-at-law and the usual reference was made to the Master, to inquire—whether that person (who had been made a defendant) was the heir-at-law of the testator, and if not who

Will admitted; or must be proved.

The heir-at-law may admit its validity; and if he does so and dies, his heir is bound and the will need not be proved. (*a*) But where he does not distinctly admit it, even though he acknowledges that he believes it to have been made, regular proof must be given, or there can be no decree. (*b*)

At law one of the witnesses,

At law a single attesting witness is allowed to prove all the requisites of its execution, according to the Statute of Frauds; which enacts that the will "shall be in writing, and signed by the devisor, or

[123]

"by some other person in his presence and by his express "directions, and shall be attested and subscribed in the "presence of the devisor by three or four credible witnesses." (*c*)

but in equity all, must be examined.

And the practice in equity was formerly the same. But Lord Talbot laid down a rule, which has ever since been adhered to in the Court of Chancery, that all the three witnesses, or at least all of them that are in England, and able to give evidence,

was; the Master, by his report, stated that he could not find who was the heir of the testator *ex parte paterna*, but that the defendant was his heir *ex parte materna*, whereupon the bill was dismissed (this finding negativing the heirship altogether) as against that defendant; and the plaintiffs, under these circumstances, could not establish the will; but, waiving that part of the relief, were allowed the other relief prayed by the bill; Thornton *v.* Knight, Roll's Trin. Term, 1845, MS., C. A. C., of counsel for other defendants. This Master seems to have exercised a most praiseworthy degree of vigilance, although his report was somewhat absurd. Another Master, to whom the very same matter was referred, in another suit, Shalcross *v.* Wright (also at the Rolls, MS., C. A. C., of counsel for the other defendants) had actually reported this very person heir; merely, as it would seem, because no other person appeared more nearly related to the testator!]

(*a*) Robinson *v.* Cooper, 4 Sim. 131; Locke *v.* Foote, 4 Sim. 132. [The admission of a will in the separate answer of a married woman, heiress-at-law of the testator, is not sufficient evidence to enable the Court to declare the will established; Brown *v.* Hayward, 1 Hare, 433. And that the admission of an adult heir will not bind his infant heir; see Cartwright *v.* Cartwright, 2 Dick. 545. As to admissions in the answer, *vide supra*, p. 10, *et seq.*; and as to admissions and waivers of proof, made by agreement, *vide supra*, p. 47.]

(*b*) Potter *v.* Potter, 1 Ves. 274; 3 Atk. 719. In Hood *v.* Pym, 4 Sim. 101, the counsel had inadvertently omitted to prove the will, and the bill was dismissed; but on a re-hearing, [and a motion for permission to exhibit interrogatories to prove the will,] leave was given to prove the will, it not having been the subject of dispute in the cause. [The Court never allows a will to be proved by examination of witnesses *vivâ voce* in Court, and therefore still less by affidavit; for it is not sufficient to prove a mere signing and sealing as in the case of a deed, but the sanity of the person, and all other the matters required by the statute have to be proved; and it is quite obvious that these cannot be proved in that manner, because the defendants have a right to cross-examine; as to these, see Eade *v.* Lingood, 1 Atk. 293, S. P. Eyles *v.* Ward, Mos. 379. And, as to sanity, Harris *v.* Ingledew, 3 P. W. 93; Wallis *v.* Hodgeson, 2 Atk. 56.]

(*c*) Stat. 29 Car. 2, c. 3, s. 5, [still the law, as to wills made on or before the 31st of Dec. 1837,] and see Longford *v.* Eyre, 1 P. Wms. 740. [But, as to wills made after the 31st of Dec. 1837, see the provisions in the Act, for the amendment of the law with respect to wills. 7 Wm. 4, and 1 Vict. c. 26, set forth below, p. 182.]

must be examined. (*a*) Lord Camden gives the reason of this strictness in the celebrated judgment which he delivered as Chief Justice in *Hudson* v. *Kersey*; (*b*) "Sanity is the great fact the witness is to speak to when he comes to prove the attestation; and that is the true reason why a will can never be proved as an exhibit *vivâ voce* in Chancery, though a deed may: for there must be liberty to cross-examine to this fact of sanity. (*c*) From the same consideration it is become the invariable practice of that Court, never to establish a will unless all the witnesses are examined; because the heir has a right to proof of sanity from every one of them whom the statute has placed about his ancestor." In a bill however, filed for the purpose of carrying a will into execution, as well as establishing it, if the will is satisfactorily proved by one witness, a decree may be given for certain purposes (such as the appointment of new trustees), and a commission to examine another of the witnesses abroad will be dispensed with. (*d*) The point of sanity is so essential: that where it has not been attended to in

Reason of this rule.

Sanity of the testator is to be proved.

(*a*) See Grayson v. Wilkinson, 2 Ves. 459; Townsend v. Ives, 1 Wils. 216. [In a suit to establish a will in equity all the witnesses to it should be examined, or proof given of the death of those not examined;] Ogle v. Cook, 1 Ves. 177. [One witness dead and another out of the jurisdiction, proof of handwriting allowed, in Banks v. Farquharson, Dick. 167. Where one of the witnesses to a will was not to be found, on sufficient proof, the will declared to be well executed, in Binfield v. Lambert, Dick. 337. But in another case the will was not declared well executed, but only an order made that the trusts should be performed and carried into execution; Id. ibid. note; see also Dick. 349. One witness of a will (disposing of real estate) being in Jamaica, his evidence dispensed with, in Carrington Ld. v. Payne, 5 Ves. 405. One witness, of whom no account could be given, proof by him was dispensed with, in M'Kenzie v. Fraser, 9 Ves. 5. Witness to a will of real estate having become insane, proof of his handwriting was allowed, in Bernett v. Taylor, 9 Ves. 381. Practice in a suit to prove a will where one of the witnesses is abroad, see Hare v. Hare, 5 Beav. 629, and Dan. Ch. Pr., by H., 836.]

(*b*) Reported in 4 Burn's Ecc. Law, 88.

(*c*) [Eade v. Lingood, 1 Atk. 293; Eyles v. Ward, Mos. 379, *et vide supra*, p. 180, n. (*b*).]

(*d*) [In establishing a will the attestation of all the witnesses must be proved; and if not personally, either that they are abroad, or dead; and the proof must be positive. But in proving a will for certain purposes only, such proof as will satisfy the Court is sufficient; and in such case leave given to exhibit interrogatories for the further proof of the will for such purposes;] Wood v. Stane, 8 Pri. 613; and see the cases cited there; [and see Bishop v. Burton, 2 Com. 614. So, in the Chancery of Ireland, when it is sought to have a will disposing of real property declared to have been well proved, it must be proved by all the witnesses, or there must be proof of their death and handwriting; but for other purposes, not requiring such a decree but merely to read it as a legal instrument, one witness is sufficient to prove it; Concannon v. Cruise, 2 Moll. 332. Further, on this subject, see Seton on Decrees, p. 82.]

examining the witnesses, the cause will be adjourned at the hearing for the express purpose of exhibiting to them an interrogatory to prove that fact. (*a*) A will is never allowed to be proved before the Master for the purpose of establishing it. (*b*)

Will Act.

[It seems necessary in this place to add some part of the Will Act, regulating the law as to wills and appointments of a testamentary nature.

Stat. 7 Wm. 4 and 1 Vict. c. 26.

This statute, of 7 Wm. 4 and 1 Vict. c. 26, is entitled "An Act for the amendment of the laws with respect to Wills;" and is intended to be universally applicable to all wills made after the 31st day of December, 1837. (*c*) Omitting the sections not strictly relevant, it may suffice to notice in this place, that by

No will of a minor to be valid;

s. 7, "No will made by any person under the age of twenty-one years shall be valid."

nor of a *feme covert*, except such as might be made before.

s. 8, "No will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act."

Will to be in writing, and signed or signature acknowledged in presence of two witnesses at one time; who to attest and subscribe the will in

s. 9, "No will shall be valid unless it shall be in writing, and executed in manner herein-after mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time; and such witnesses shall attest and shall sub-

(*a*) Wallis *v.* Hodson, 2 Atk. 56; Abrams *v.* Winshup, 1 Russ. 526. [Where a suit is instituted to prove a will of realty, the sanity of the testator must be proved: although not requisite when to establish a deed of trust for payment of debts; Harris *v.* Ingledew, 3 P. Wms. 93.]

(*b*) Lechmere *v.* Brasier, 2 J. & W. 289. [The Court requires the judgment of the Ecclesiastical Court, that an instrument is testamentary, but is not always satisfied with the proof in that Court, but requires the witnesses to be examined again, or if no witnesses, proof of signature; Rich *v.* Cockell, 9 Ves. 376. Probate of a will in the Ecclesiastical Court, is sufficient as far as it goes, further proof, if necessary, may be proceeded on in this Court; Colman *v.* Sarrall, 1 Ves. jun. 54. A will of personal estate, which lies in a foreign country, may be proved here: Jauncey *v.* Sealey, 1 Vern. 397. On the other hand, a will may be sent abroad to be proved; *vide supra*, p. 115, n. (*c*).]

(*c*) [The editor of this edition had collected abundant materials for notes to this statute, so far as relates to the execution and attestation of wills, made after the year 1837; but, on deliberation, he thought that as reference to works on wills could not, after all, be wholly dispensed with, they would but uselessly swell this work with matter, not exclusively pertinent to the subject of evidence in equity; such as will appear by reference to Mr. Tamlyn's work on Evidence, p. 179, *et seq.*]

scribe the will, in the presence of the testator, but no form of attestation shall be necessary." presence of the testator.

s. 10, "No appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner herein-before required; and every will executed in manner herein-before required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity." Appointment by will to be executed like other wills; even though other form of execution or solemnity prescribed.

s. 11, The will of "any soldier being in actual military service or any mariner or seamen being at sea," are excepted out of the operation of the act. Will of soldier in service, or sailor at sea.

s. 12, Provides as to "wills of petty officers and seamen" in the Royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, &c. Royal navy and marines.

s. 13, "Every will executed in manner herein-before required shall be valid without any other publication thereof." Publication of a will not required.

s. 14, "If any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid." (*a*) Will not to be invalid by reason of incompetency of a witness.

s. 15, "If any person shall attest the execution of any will to whom, or to whose wife, or husband, any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment, shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the Gifts to (or to the wife or husband of) attesting witness void.

(*a*) [A later statute, the "Act for improving the law of Evidence," 6 & 7 Vict. c. 85, has most materially altered the law, here referred to; as to the inadmissibility (called incompetency) of certain persons to testify, as witnesses. *Vide infra*, Pt. II. ch. 1, s. 4.—Witness incompetent.]

execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will." (*a*)

Creditor, or the wife or husband of a creditor, may be an attesting witness.

s. 16, "In case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof." (*b*)

Executor not incompetent as a witness.

s. 17, "No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof." (*c*)

As to revocation, and indeed many other important matters, reference must necessarily be made to the Act itself.

Issue *devisavit vel non.*

[124]

However clearly a will may have been proved upon interrogatories, the heir-at-law may still claim, as a right, an issue *devisavit vel non.* (*d*) The rule that all the three witnesses must be examined, extends also to the trial before the jury; in that proceeding "those three are not the witnesses of the one party or the other, but of the Court." (*e*) But it does not hold good universally there. In the great cause of *Tatham* v.

(*a*) [*Vide supra*, p. 183, n. (*a*); but *semble* the "Act for improving the law of evidence," whilst it would admit the witnesses here provided for, does not alter this harsh, however proper, provision of the Will Act.]

(*b*) [*Vide supra*, p. 183, n. (*a*).]

(*c*) [*Vide supra*, p. 183, n. (*a*).]

(*d*) See Pemberton *v.* Pemberton, 11 Ves. 53; Townsend *v.* Ives, 1 Wilson, 216. [Bootle *v.* Blundell, 19 Ves 501-2, Ibid. 504-5; unless by acquiescence or misconduct he has precluded himself; Ibid. 508, and as in Man *v.* Ricketts, 7 Beav. 93. Where the heir-at-law, by his answer admitted the execution of the will under which the plaintiff claimed; but alleged that it was revoked by a subsequent will, whereby the estate in question was devised to the defendant, which subsequent will was unintentionally destroyed, and submitted either that the subsequent will ought to be established, or that there was an intestacy; held the heir was not entitled to an issue; Whitaker *v.* Newman, 2 Hare, 299. The defendant, in such case, not giving any evidence of the alleged revocation, beyond the mere statement which was read by the plaintiff from the answer, is not entitled to any inquiry respecting it, and the Court will declare the will established; Ibid. As to revocation of wills made since 31st Dec. 1837, see the stat. 7 Wm. 4 & 1 Vict. c. 26, ss. 18 to 23. The same circumstances ought to be proved to have happened on the part of the testator, to show his intent of revoking a suit in equity as at law, unless they were prevented by the person interested; Piggott *v.* Penrice, 1 Com. 250.]

(*e*) Bootle *v.* Blundell, 19 Ves. 494, 500, S. C. Coop. 136. and 1 Mer. 103, where the subject is discussed at some length. [Where, on the trial of an issue

Wright, (*a*) in which the bill was not filed by the devisee to establish the will, but by the heir to set it aside, the defendant called one witness, and produced the other two, offering them to the plaintiff to call and examine, which he declined, not wishing to make them his own witnesses. The question was twice solemnly argued, and a most learned judgment was given by Lord C. J. Tindal and Lord C. B. Lyndhurst, assisting Lord Chancellor (Brougham,) in confirmation of the [judgment of the] Master of the Rolls (Sir J. Leach) who had adjudged the issue to have been sufficiently tried. [Lord Brougham having been counsel in the cause, availed himself of the assistance of the Lord C. J. and Lord Lyndhurst, C. B. (*b*)]

Documents thirty years old.

When a deed, or will, or document of any kind, is thirty years old, reckoning from its date, it is no longer necessary to prove it. (*c*) But if as C. B. Gilbert says, "possession hath not gone along with the deed, some account ought to be given of the deed, because the presumption fails where there is no possession." (*d*) He adds a caution that if there is any blemish in the ancient deed, it ought to be regularly proved; or where it imports a fraud, as where a man conveys a reversion to one, and afterwards conveys it to another, "for no man shall be supposed to be guilty of so manifest a fraud." (*e*) Lord Eldon says of wills, "In a Court of law, a will thirty years old, if possession has gone under it, and sometimes without possession, but always with possession, if the signing be sufficiently recorded, proves itself; but if the signing be not sufficiently recorded, it would be a question whether the age proves its validity: and then possession under the will, and claiming and

Deeds.

Wills.

[125]

directed by the Court of Chancery, plaintiff, in obedience to the rule of that Court, calls the second attesting witness, who gives evidence adverse to the plaintiff, the counsel of the plaintiff may put questions to him in the nature of a cross-examination; Bowman *v.* Bowman, 2 M. & Rob. 501, Cresswell.]

(*a*) 2 Russ. & M. 1.

(*b*) [2 Russ. & M. 30-1.]

(*c*) Bull. N. P. 255; Doe *v.* Wolley, 8 B. & C. 22; Beer *v.* Ward, 1 Phil. on Ev. 458, note. [And see Fenwick *v.* Freed, 6 Mad. 7; Ely, D. of *v.* Stewart, 2 Atk. 44, S. C. Barn. 170; Aylward *v.* Kearney, 2 Ball & B. 463; Doe *v.* Samples, 3 Nev. & P. 254; Doe *v.* Pearce, 2 Mo. & R. 240, as to a will. Letters (out of proper custody and) thirty years old, need no further proof; Doe *v.* Beynon, 4 P. & D. 193. As to a will, see also Miller dem. Miller ten. 2 Bing. N. S. 76.]

(*d*) Gilb. on Ev 102. [In general the document must come out of proper custody, though perhaps not the only or the most proper custody; *vide supra*, p. 159-60, n. (*a*).]

(*e*) He cites Chattle *v.* Pound, Hill, Ass. 1701.

dealing with the property as if it had passed under the will, is cogent evidence to prove the due signing of the will, though it be not recorded. (*a*) Sir Wm. Grant, M. R., had some little doubt whether the age of a will was to be reckoned from its date or from the death of the testator, (*b*) and in a case where this question was raised, he avoided it, by declaring that as the devisees had proved the handwriting of two deceased witnesses, and had been unable, after diligent inquiry, to hear of the third, the will was well proved at all events. (*c*)

Age of a will.

II. Unattested instruments, letters, &c.

Of letters, accounts, and other writings, little need be added here. (*d*) When the actual writer cannot be produced to prove them the secondary evidence most commonly resorted to is, proof of the handwriting, (*e*) and of the custody from which they have been brought. (*f*) Some points were ruled by Sir

(*a*) Rancliffe *v.* Parkyns, 6 Dow. P. C. 202.

(*b*) [Common sense, grounded on the reason in such cases, seems to decide it should be reckoned from the date or execution at least; and so it was decided, in Man *v.* Ricketts, 7 Beav. 43.]

(*c*) M'Kenire *v.* Fraser, 9 Ves. 5.

[Injudicious as it most certainly is to have a will attested by marks only, on account of the difficulty of proving their identity, yet when a will was so attested by the signature of V, and the marks of C and D, (all the witnesses being dead,) the signature of V. was proved, and the daughter of C. and D. proved they were both dead, that they had lived near the testator, that no other persons of their names were living in the neighbourhood, that D. could not write, and that C. could write his name only; it was held sufficient. Doe d. Counsell *v* Caperton, 9 C. & P. 112. And where the witness attesting a will, being unable to read or write, had his hand guided in subscribing his name as a witness, it was held to be properly subscribed within the statute; Harrison *v.* Elvin, 2 Gale & D. 769. *Secus*, as to an affidavit, *causa patet*. As to proof of wills, deeds, and other documents destroyed, lost, or detained by the other party, *vide infra*, Secondary Evidence. For example only, a will of real estate being lost was nevertheless established by means of a copy, in Ellis *v.* Medlicott, 4 Beav. 144, where see also Harrison *v.* Weale. Where documents tendered in evidence appear imperfect, mutilated or injured, the objection to them on that account is but to their value and not to their admissibility; see Roe d. Trimleton Lord *v.* Kemmis, 9 Cl. & Fin. 774.]

(*d*) [In the Chancery of Ireland, as in that of England, letters and papers of any class may be proved, as to the handwriting, as exhibits at the hearing, *viva voce*, (or, in England at least, by affidavit,) but as the witness on such an occasion cannot be cross-examined, if there be any doubt, an opportunity will be given by the Court to see if he has sworn truly; Ellis *v.* Deane, 3 Moll. 63.]

(*e*) *Vide infra*, P. II. ch. 3, § 2.

(*f*) [As to custody, *vide supra*, p. 159-60. And as to the circumstances of this kind tending to prove the authenticity and genuineness of an instrument, see Aylward *v.* Kearney, 2 Brod. & B. 463. As to custody, see also Atkins *v.* Hutton, 2 Anst. 387; Potts *v.* Durant, 3 Anst. 769; Atkins *v.* Drake, 1 M. Cl. & Yo. 213; Armstrong *v.* Hewitt 4 Price, 216, as to terriers, endowment deeds, &c.; Doe *v.* Samples, 3 Nev. & P. 254, as to a settlement, Ludlow, Corp. of *v.* Charlton, 9 Car. & P. 242, as to Corporation books, Doe *v.* Brynder, 4 Per. & D. 193, as to Letters, Doe *v.* Owen, 8 Car. & P. 751, as to a will; Fitzwalter Peerage Case, 10 Cl. & Fin. 193, as to a pedigree: and note, it is sufficient in general to render a document admissible, that it is produced from a place when likely to be found, although not the only or the *most* proper place of custody; Croughton *v.* Blake, 12 Mees. & W. 205.]

John Leach, when Vice Chancellor, in the year 1821. (*a*) "That a letter appearing upon the face of it to be written by the defendant's ancestor, upon the subject of the suit, and coming out of the custody of the representative of his attorney, and dated in 1748, was admissible, without proof of the handwriting:—the contents of the letter, like the contents of a deed, affording intrinsic evidence in its favour. (*b*) That the finding of such a letter amongst the papers of the attorney was *primâ facie* evidence that it was written to the attorney, there being no address to it, the envelope being lost. And that a letter found amongst the papers of the attorney, not addressed, but appearing by the contents to be written upon the subject, by a person employed as the London law agent of the defendant's ancestor, also admissible in evidence." (*c*)

(*a*) In Fenwick *v.* Read, 6 Mad. 8.

(*b*) [The force of evidence of this kind, see in Bootle *v.* Blundell, 19 Ves. 505-6, when Lord Eldon comments on a letter.]

(*c*) And *vide infra*, P. III. ch. 2, under the head of Inspection.

[Although letters, &c. are here adverted to as frequently forming part of the evidence in a cause, it will be obvious that the circumstances of each particular case must determine (upon the principles applicable to all instruments of evidence) how far each document is admissible, as evidence, on behalf of the party desiring to use it. Thus, in the Admiralty Court, letters of a Master of a vessel to the owners, although written at the time, and expressly apprising them of the misconduct (desertion, &c.) of a seaman of the vessel were held to be inadmissible as evidence for the owners in a suit for his wages; Jupiter Crosbie, 2 Hagg. 225; and in Equity, see Montgomery *v.* Att. Gen., 9 Mod. 365. And in Bankruptcy, see *ex parte* Annandale *v.* Curtis, 4 Dea. & Ch 511. At Law, a letter written by a party can only be made evidence, for him, in his own cause, as a notice or demand; Richards *v.* Frankum, 9 C. & P. 221. Where letters, in a correspondence between plaintiff and defendant, were offered in evidence, at law; it was held, the defendant might read his answer to the plaintiff's last letter, dated the day before; Roe *v.* Day, 7 C. & P. 705; and see, as to letters forming a correspondence, Sturge *v.* Buchanan, 2 M. & Rob 90. It was proposed, on the part of the plaintiff, in an action at law, to give in evidence a letter written by the attorney of the defendant, which purported to be in answer to one written to him by the attorney of the plaintiff; held, that if the counsel for the plaintiff put in this letter he should also call for and put in the other as his evidence; Walson *v.* Moore, 1 Car. & K. 626. What is sufficient, at law, as *primâ facie* evidence of the delivery of a letter, see Skilbeck *v.* Garbett, 14 Law J., N. S. 338; 9 Jur. 939. The very fact of copies of letters being contained in a merchant's letter book was evidence, against the party, that the letters had been sent; Sturge *v.* Buchanan, 2 Per. & D. 57. Postmark on a letter held to be *primâ facie* evidence of publication (of libel); Shepley *v.* Todhunter, 7 C. & P. 680. A letter expressed to be written "without prejudice" not allowed to be read in evidence, at law; Healey *v.* Thatcher, 8 C. & P. 388. As to the effect of a receipt and its being but *primâ facie* evidence of payment, see Farrar *v.* Hutchinson, 1 P. & D. 437; of an I. O. U., see Curtis *v.* Rickards, 1 Man. & Gr. 46; S. C. 1 Sc. N. S. 155; of a bill of lading, see Berkley *v.* Watling, 2 Nev. & P. 178, and Mitchell *v.* Ede, 3 P. & D. 513.]

[126]

SECTION VI.

PROOF OF EXHIBITS, *vivâ voce*, [OR BY AFFIDAVIT. (*a*)]

For the sake of convenience and of saving expense, several kinds of Exhibits are allowed to be proved *vivâ voce* at the hearing. (*b*)

This indulgence is however subject to strict limitations.

Order. An order must be obtained, (*c*) describing the documents minutely: if a deed, the date and parties' names; if a letter, the date and the names of the persons by whom it was written, and to whom it was addressed, &c. &c. And a copy of this order must be left with the adverse clerk in Court (*d*) two days before the hearing. (*e*)

What may be thus proved. It is sometimes said that no questions which will admit of a cross-examination may be asked a witness thus proving exhibits. This is not, strictly speaking, correct: but the fact is that the examination is restricted to three or four very simple points, such as, the custody and identity of an ancient document

(*a*) [As to the admission of such, to save the expense and trouble of proof, *vide supra*, p. 47, *et seq.* As to proof in Court, viz. before the Examiner, *vide supra*, p. 64, and before commissioners, *vide supra*, p. 101. For Forms of Interrogatories, *vide infra*, Appendix.]

(*b*) [By an Order of 26th Aug. 1841, No. 43, "In cases in which any exhibit may by the present practice of the Court be proved *vivâ voce* at the hearing of a cause, the same may be proved by the *affidavit* of the witness who would be competent to prove the same *vivâ voce* at the hearing." Sand. Ord. 886. As to Affidavits generally, *vide post*.]

(*c*) [Whether the proof is to be *vivâ voce*, or (under the order,) by affidavit; but in the latter case, the order may be obtained after the affidavit has been made; Clare *v.* Wood, 1 Hare, 314. And a witness may prove exhibits though examined before in the cause; Neep *v.* Abbot, 1 Coop. 191.]

(*d*) [Now his solicitor, see Sand. Ord. 923.]

(*e*) Hinde's Ch. Pr. 370. There was an order in the Exchequer that, "There "need be no notice of an order to prove "exhibits for reading any deeds or evi- "denco that do not require proof: and "all exhibits to be proved at hearing "must be inserted in the order, and no "note of them to be given over." Ord. Exch. 2 Fowl. 189; where the documents which might be read as exhibits without order are spoken of at some length. And see Lake *v.* Skinner, 1 J. & W. 15. [A deed proved by an attesting witness at the hearing and *vivâ voce* (or now by affidavit) is well proved for all purposes in the cause, unless it is impeached; Bowser *v.* Colby, 1 Hare, 109.]

produced by a librarian or registrar, (*a*) the accuracy of an office copy produced by the proper officer, (*b*) the execution of a deed where the examinant is the attesting witness, (*c*) the handwriting of a letter or receipt or promissory note, &c. &c. (*d*)

What may not; [127]

It is not allowable to prove *vivâ voce* the handwritings of attesting witnesses to a deed who are alleged to be dead. (*e*)

a will;

Nor a will, because many questions might be put to the witnesses respecting the sanity of the testator, &c. (*f*)

a deed, if impeached;

Nor a deed, that is impeached by the answer; because, in that case, the defendant ought not to be deprived of an opportunity of cross-examining the attesting witness. (*g*)

a document requiring the proof of other facts.

Nor a book in which the collector of a former rector had kept accounts of the receipt of tithes, because, besides the handwriting, it would be necessary to prove that it came out of the proper custody, and that the writer was the collector of the tithes. (*h*)

Cause stands over to have them proved.

But where the writing tendered is really an important document, the Court readily gives leave to postpone the cause for the purpose of proving it by interrogatories, and the adverse counsel seldom ventures to interpose, for fear of giving a bad appearance to his own case. (*i*)

(*a*) [As to custody and the necessity of proving wherein documents come to give them weight in evidence, *vide supra*, p. 186, n. (*f*).]

(*b*) [As to office copies generally, *vide supra*, p. 152; but *semble*, an examined copy, cannot be thus proved, for cross-examination may be needful, *vide supra*, p. 159-60, *et infra*, p. 190.]

(*c*) [As to proof of execution of deeds, &c., *vide supra*, p. 176, *et seq.*]

(*d*) Hinde's Ch. Pr. 270; 2 Fowl. 187; Pomfret E. of, *v.* Windsor Lord, 2 Ves. 479; Ward *v.* Eyles, Mos. 381; [and see Row *v.* Creagh, How. Pr. Ex. Ir., 461.]

(*e*) Bloxton *v.* Drewitt, Ch. Pr. 64. [As to this and proof of handwriting generally, *vide infra*, Pt. II. ch. 3, s. 2.]

(*f*) Harris *v.* Ingledew, 3 P. Wms. 93; [Eade *v.* Lingood, 1 Atk. 203;] Niblett *v.* Daniel, Bunb. 310; where Lord Macclesfield laid down the rule "that for the future no will of real estate should be proved as an exhibit." 2 Fowl. 188; and *vide supra*, p. 178, *et seq.*]

(*g*) [And yet it may be so proved against the other defendants;] Barfield *v.* Kelly, 4 Russ. 355; 4 Sim. 108. [If the validity, and not the execution of a deed be questioned, it may be proved *vivâ voce* at the hearing; Att. Gen. *v.* Pearson, 7 Sim. 309. But where upon a bill filed for payment of an annuity, the circumstances under which the annuity deed had been executed were disputed by the parties, the plaintiff was not allowed to prove the deed *vivâ voce* as an exhibit; but leave was given to file interrogatories for that purpose; Maber *v.* Hobbs; 1 Yo. & Col. 585.]

(*h*) Lake *v.* Skinner, 1 J. & W. 9.

(*i*) Bloxton *v.* Drewitt, Ch. Pr. 64; Banks *v.* Farques, (*i. e.* Farquharson), Ambl. 145; Clarke *v.* Jennings, 1 Anstr. 173; Hood *v.* Pimm, 4 Sim. 101, and the cases collected there. Lake *v.* Skinner, 1 J. & W. 16. Where exhibits in a foreign language were proved, the cause was postponed that a proper person might prove the English translations of them to be correct; Henriques *v.* Henriques, cited 2 Fowl. 190. [In the Chancery of Ireland, the

In a case in the Exchequer, (*a*) counsel attempted to prove *vivâ voce*, [in pursuance of] an order, an office copy of the judgment which had been entered up against an insolvent. He relied on the § 45 of the Insolvent Act, 1 Geo. 4, c. 119, which enacts "That a true copy of every such petition, schedule, order, "judgment, and other proceeding, signed by the officer in whose "custody the same shall be, or his deputy, certifying the same "to be a true copy of such petition, schedule, order, judgment, "or other proceeding, as the case may be, without being written "on stamped paper, shall at all times be admitted, in all "Courts, whatever as legal evidence of the same respectively."

[128] Counsel (appearing for infants) objected that an examined copy was necessary, which could not be proved *vivâ voce*. The insolvent's schedule of effects signed by the deputy officer of that Court was also offered, but it was objected there was no proof of his holding that office. The act did not provide, as some do, that a paper *purporting to be* a copy should be received as such. Where it was required that a copy should be sealed, it was always necessary to prove the seal." (*b*) Lord Lyndhurst, C. B., took a day to consider, and then said, "an examined copy was required. In proving an examined copy cross-examination is necessary; it cannot therefore be proved *vivâ voce*. You must apply therefore for leave to exhibit interrogatories to prove the examined copy." On the second point he did not appear to have quite made up his mind: he said, "I would advise you "also to apply for leave to exhibit an interrogatory to prove "the name of the officer; I think it necessary: I know nothing "of the Insolvent Court."

[But, as we have already had occasion to observe, (*c*) almost all the difficulties as to documents of this kind, copies made evidence by certain Acts of Parliament, are now removed.]

title of plaintiff being evidenced by an instrument more than thirty years old, it was produced at the hearing, and a witness was examined to it *vivâ voce*, as an ancient deed; but he failing in making the necessary proof, the decree was made with a preliminary direction that plaintiff should be at liberty to exhibit interrogatories to prove the deed before the Master, and thereupon to have the relief prayed by his bill; Lawrence *v.* Sharpe, 1 Moll. 252.]

(*a*) Flint *v.* Watson, 10 Dec. 1832, MS., *vide supra*, p. 156, n. (*b*).

(*b*) [But since then stat. 8 & 9 Vict. c. 113, *supra*, p. 157, *et seq.*, provides for such cases.]

(*c*) [*Supra*, p. 157, *et seq.*]

The Court [of Chancery] always asserts a right, but rarely exercises it, of examining a witness who has come to prove an exhibit, or of putting to him questions suggested by counsel. (*a*) At the same time it strictly forbids cross-examination. (*b*) Where the defendant moved that certain witnesses whom the plaintiff was about to examine by a commission, to prove exhibits, might be brought up and examined *vivâ voce* and cross-examined, Lord Hardwicke said that the utmost latitude the Court had taken was to allow the proving of the exhibits *vivâ voce* at the hearing, but not to let in other examinations: and moreover that this was allowed only where the application was by the party who was to make use of the exhibits; but that there never was a case where it was allowed on the application of the opposite party. (*c*)

Cross-examination, *vivâ voce.*

The Court of Exchequer was still more strict in granting this indulgence of proving exhibits *vivâ voce;* for there, when an infant was a party and his interest was concerned, all exhibits had to be proved by an examination upon interrogatories. (*d*)

[129]

The attendance of a witness for this purpose may be enforced by process of *subpœna*, to obtain which an order should be procured by motion in Court, as of course, for without an order the *subpœna* cannot be obtained from the *subpœna* office. (*e*) The return of the writ should be the day on which the cause is set down to be heard, which will be mentioned in the *subpœna* to hear judgment. (*f*) Personal service is necessary, and a tender of expenses, &c. as in the ordinary *subpœna ad testificandum.* (*g*)

Subpœnâ for witness.

When the cause is called on, and the exhibits are required to be proved, the original order, the exhibit, and the witness,

Mode of proving Exhibit.

(*a*) Turner *v.* Burleigh, 17 Ves. 355; Potts *v.* Durant, 3 Anstr. 789.

(*b*) [So in the Chancery of Ireland letters and papers of any class may be proved as to the handwriting *vivâ voce;* but the witnesses cannot be cross-examined; if there be any doubt an opportunity may be given by the Court to see if he has sworn duly; Ellis *v.* Deane, 3 Moll. 63.]

(*c*) Graves *v.* Eustace Budgell, 1 Ath. 444.

(*d*) Carleton *v.* Brightwell, 2 P. Wms. 463. [That a witness cannot be examined *vivâ voce* in the Ecclesiastical Courts, see Jones *v.* Yarnold, 2 Lee's R. 568; see also, on this subject, Herbert *v.* Herbert, 3 Phill. R. 36, *vide supra*, p. 52, n. (*e*); nor are exhibits thus proved in those Courts. But see Ingram *v.* Wyatt, 1 Hagg. 100.]

(*e*) Hinde's Ch. Pr. 371.

(*f*) [*Vide supra*, p. 145.]

(*g*) Ibid. 372. [As to *subpœnâ*, &c. *vide supra*, p. 64, n. (*a*), and Sand. Ord. 1021.]

must be produced to the registrar in Court, (*a*) who will forthwith administer the usual oath, examine the witness and endorse the exhibits: (having a fee of two shillings and sixpence for each that he endorses); after which they may be used in evidence or not, as the party proving them may deem it advisable. (*b*)

As to production; The adverse party has no right (without a special order), to compel the production of an exhibit, however it has been proved, (*c*) unless perhaps where the deposition proving it sets inspection; it out *verbatim*; (*d*) nor even to inspect it; for he is not before the hearing, to "see the strength of the cause, or any deed to pick holes in it." (*e*)

When a party has, on sufficient grounds, obtained leave to deposit; inspect exhibits, they are placed in the hands of the clerk in or removal; Court, (*f*) and he is answerable for their safety. The Court prohibited the removal of one from the custody of the clerk in Court for the purpose of using it at the Nisi Prius trial, on the following certificate from the clerks in Court; "We do certify, that in all cases where exhibits are left under an order in the hands of the clerk in Court for a plaintiff or defendant, and it has become necessary to have those exhibits produced in Court or at the Assizes, it is, and ever has been, the invariable practice, that the clerk in Court in whose custody they are so [130] deposited, or some person authorized by and acting for him, and no other person, shall attend therewith, upon payment of his fees and expenses. And we know of no instance where exhibits have been ordered to be delivered up for the aforesaid purpose to any other person, unless by the consent of all parties, and upon payment of the clerk in Court's fees." (*g*)

When reason was given for believing that exhibits had been

(*a*) Hinde's Ch. Pr. 372. [And see Dan. Ch Pr. (by H.) 843.]

(*b*) [If the exhibits have been proved by affidavit, the course is as with affidavits generally, and *vide post.*]

(*c*) [A motion by defendant, for inspection of a book produced by plaintiff, under a commission issued, since publication, was refused with costs; Forrester *v.* Helme, 1 M'Clel. 558.]

(*d*) Hodson *v.* Warrington Earl of, 3 P. Wms. 34.

(*e*) Davers *v.* Davers, 2 P. Wms. 410; 2 Str. 764; Wiley *v.* Pistor, 7 Ves. 411; see Fencott *v.* Clarke, 6 Sim. 8.

(*f*) [Now of the Clerk of Record and Writs, by an Order of 26th Oct. 1842, No. 3; Sand Ord. 916.]

(*g*) Harris *v.* Bodenham, 1 S. & S. 283. [And see last note.]

interlined and altered since they were proved, a new commission was granted to ascertain the fact. (*a*) Where they were proved to have been forged, the Court would not allow the party to go into any other evidence. (*b*)

Examining a witness a second time;

Generally speaking, the Court will not allow the same person to be examined a second time, as a witness, except by special order, and upon interrogatories settled by the Master; but a witness who has been examined, at or before the hearing, only to prove exhibits, may unquestionably be examined to prove other deeds, papers, &c., before the Master, [and that] without a special order. (*c*)

only as to exhibits.

Costs of evidence so given.

[By an Order of the 6th of May, 1845, No. 120, "Where costs are to be taxed as between party and party, the Taxing Master may allow to the party entitled to receive such costs, all such just and reasonable expenses as appear to have been properly incurred in (amongst other things) procuring evidence by deposition, or affidavit and the attendance of witnesses." (*d*)]

(*a*) Richardson v. Lowther, 1 Ch. Ca. 273.
(*b*) Kemp v. Macrell, 2 Ves. 579.
(*c*) Courtenay v. Hoskins, 2 Russ. 253; [Neep v. Abbott, 1 Coop. 191.]
(*d*) [Sand. Ord. 1019.]

C. P.

CHAPTER IV.

[131]

EVIDENCE ALLOWED ON SPECIAL ORDER.

It has been mentioned incidentally, in the preceding sections, that the Court is always ready to give what facilities it can, for the introduction of any evidence, which will assist in bringing the merits fairly to trial; (*a*) whether by admitting some kinds which it would be expensive or troublesome to produce in the usual way, or by allowing omissions and defects in the regular examination to be supplied and remedied afterwards. (*b*)

To avoid expense or trouble:— or supply or remedy omissions or defects.

Under the first of these heads might, strictly speaking, have been placed, the subject which has been discussed in the foregoing section, as a branch of the ordinary examination of witnesses; namely, the evidence given *vivâ voce*, [or by affidavit,] to prove exhibits.

Evidence to prove exhibits.

[By an order of Nov. 1649, (during the Great Rebellion), "Depositions of witnesses in several causes which are merely cross-causes (*viz.*) between the same parties, and touching the same matter, may be used at the hearing of both causes, (coming to hearing together) without any motion or order to that behalf." (*c*)]

Evidence in cross-cause ordered to be read in original suit, and *vice versâ*;

Upon the same principle, the evidence taken in cross-suit is constantly ordered to be read in the original suit, and *vice versâ*. As Sir John Leach, when Vice Chancellor, expressed himself, "Where there is cause and cross-cause, there the order is extremely useful, because it saves the necessity of examining the witnesses in both causes, and the depositions are read with-

(*a*) [So in the Ecclesiastical Courts, after publication the Court will not allow witnesses to be examined, in the ordinary mode, on a suggestion that the Examiner, from misconstruction of the plea, has improperly rejected evidence; but, if essential to justice, may direct an examination *vivâ voce*, in open Court; Ingram *v.* Wyatt, 1 Hagg. R. 100.]

(*b*) [So in the Chancery of Ireland, a party, making out a proper case, has been allowed to examine witnesses after publication; Coates *v.* Coates, 1 Hog. 9; see also Noel *v.* Fitzgerald, ibid. 135. So after publication passed in an original cause, examination allowed in cross-cause; Scott *v.* Allgood, Prac. Reg. 87. *Sed vide infra*, p. 195, n. (*e*).]

(*c*) [Sand. Ord. 230.]

out more, if taken in both causes."(*a*) And a motion to this effect was allowed even although the cross-bill had been dismissed. (*b*) But it is far from being a motion of course. (*c*) Depositions in an original cause cannot be read in the cross-cause if the point in issue is varied: (*d*) and the depositions in a cross-cause taken after publication of those in the principal cause, are not admissible at the hearing of the latter. (*e*)

even though cross bill is dismissed.

[132]

Effect of order.

By an Order of 22nd of May, 1661, Clarendon, C., "Where either party, plaintiff or defendant, obtaineth an order to use depositions of witnesses taken in another cause, the adverse party may likewise use the same without motion, unless he be, upon special reasons, showed to the Court by that party first desiring the same inhibited by the same order so to do." (*f*)

Special cases; accounts to be taken,

Special cases, (*g*) like the following, sometimes occur, particularly when references are directed to the Master. An account having been directed to be taken against an executrix, it was objected for the defendant, that vouchers were impounded in the Ecclesiastical Court, and the habit of that Court is not to give up any thing once impounded; and it was suggested that the expense of having the officer to attend the Master would be considerable; Lord Eldon, under these circumstances, directed that the Master should allow items upon vouchers, which it should be verified by affidavit were so impounded. (*h*)

the vouchers impounded,

(*a*) In Williams *v.* Broadhead, 1 Sim. 152.

(*b*) Lubiere *v.* Genou, 2 Ves. 379.

(*c*) [It does not appear that the Order of 1649 has been expressly revived.]

(*d*) Christian *v.* Wrenn, Bunb. 321; a modus was there stated differently. [After a decree in original cause, the evidence in a cross-cause relevant to matters in issue in the original cause not allowed to be read; Wilford *v.* Beaseley, 3 Atk. 501; and see Ward *v.* Eyles, Moss. 377.]

(*e*) Ridley *v.* Obee, and Taylor *v.* Obee, 3 Pri. 26 and 83. [*Sed vide supra*, p. 194, n. (*b*).

By an Order of 20th Aug. 1841, "When a defendant in Equity files a cross-bill against the plaintiff in Equity, for discovery only, the costs of such bill, and of the answer thereto shall be in the discretion of the Court, at the hearing of the original cause." Sand. Ord. 885. And by the next Order, No. 42, "The answer to such cross-bill may be read and used by the party filing such cross-bill, in the same manner and under the same restrictions as the answer to a bill praying relief may now be read and used." Ibid. 885. And by an Order of 8th May, 1845, No. 125, "The costs of a bill of discovery, filed by any defendant to a bill for relief, are to be costs in the original cause, unless the Court otherwise orders." Ibid. 1020.

That a cross-bill taken *pro confesso* may be read at the hearing of the original cause, see Cory *v.* Gertegen, 2 Mad. 43.]

(*f*) Bea. Ord. 194; [Sand. Ord. 304.]

(*g*) [As to cases of fraud or trust, *vide supra*, p. 6, n. (*a*).]

(*h*) Neilson *v.* Cordell, 8 Ves. 146.

or after many years.

On an inquiry into very remote transactions, Sir W. Grant, M. R. directed accounts kept at the time by a person no longer living to be taken, (not as the account prayed by the bill, but) as *primâ facie* evidence of the particular items, throwing on the other side the onus of impeaching them; "for," he said, "it would be too much, at the distance of forty-nine years, to call for vouchers of every payment; and in mercy to the parties, I wish to save them the expense in which they would be involved by going minutely into the particulars of such an inquiry." (*a*)

Cases of defects or omissions;

Relief has been given to a great extent in cases of defects or omissions: whether they are brought to light, and become material, in consequence of something which arises unexpectedly in the course of the proceedings; or were caused by accident or inadvertence. (*b*) When the former of these circumstances occurs, the form which the relief takes is, generally, permission to file a supplemental bill, or a bill of review, (*c*) or a supplemental an-

Form of relief;

[133]

(*a*) Chalmer *v.* Bradley, 1 J. & W. 65.

(*b*) [Defendant who has been examined, before the Master, on account decreed, may be re-examined on new interrogatories without order; Cornish *v.* Acton, Dick. 149: and see cases cited below as to examinations of parties before the Master; and to prove exhibits, *et vide supra*, p. 193, n. (*c*).

The Court is to judge when it will allow examination after publication. It was allowed when a witness eighty years old was not discovered until after the hearing; London Mayor of, *v.* Dorset E. of, 1 Ch. Ca. 228. *Semble*, a mistake of the law or practice of the Court is not, *per se*, a ground for allowing a party to go into further evidence, on facts at issue, at the hearing of the cause; Woodgate *v.* Field, 2 Hare, 211. When a witness had omitted to answer some part of the interrogatories exhibited to him; on motion, the interrogatories and the depositions were referred back to the Examiner, in Potts *v.* Curtis, 1 Young, 343. So where the Examiner had omitted to take down the depositions of one of plaintiff's witnesses, to part of an interrogatory, leave was given to examine as to such part, with liberty to cross-examine; Bridge *v.* Bridge, 6 Sim. 353. Indeed it may be laid down as a general principle that omissions and defects may be supplied; but negligence and delay may preclude a party from such indulgence, as in Tulloch *v.* Hartley, before Lord Lyndhurst, C., 24th Jan. 1845, MS.]

(*c*) As in [a case where leave was given to defendant to file a supplemental bill, putting in issue deeds material for his defence, which, owing to his residence abroad, as it was proved by affidavit of himself and his solicitor, had not been discovered until after the issue joined, after great lapse of time and death of the parties. Due diligence essential to be shown in such cases;] Barrington *v.* O'Brien, 2 B. & B. 140. And see the cases cited there, and see Partridge *v.* Usborne, 5 Russ. 195; where the subject is discussed at great length. [Plaintiff having in ignorance and by mistake set out in his bill a supposed defect in his title, which the Lord Chancellor held to be a fatal one, the bill was about to be dismissed; but it was discovered, before order made, that the supposed defect did not exist; held, that evidence of the true state of the title might be received, although strictly speaking of a fact not in issue. Liberty was given to file a supplemental bill to rectify the mistake; Sadler *v.* Lovatt, 1 Moll. 162.

swer (*a*), and to go into evidence in support of it. But this has sometimes been held unnecessary; as when an old paper had been newly discovered. (*b*) In a case in which two witnesses who had been relied upon to prove handwriting declared their ignorance of it, the party was allowed to examine other witnesses to that point, since "the previous examination did not furnish any reason why there should not be a further examination." (*c*) But where a witness omitted to state an additional fact which, in a memorandum previous to his examination he had mentioned that he could state, it was held that he could not be re-examined, to give him an opportunity of stating it. (*d*)

Omissions caused by accident or inadvertence;

Many of the most remarkable instances of relief being given to supply omissions which had happened through inadvertence are collected and commented upon by the Vice Chancellor of England, (Sir L. Shadwell), in deciding the case of *Hood* v. *Pimm*. (*e*) They cannot be given better then by quoting the words of the judgment itself. "There is an abundance of cases to show that, uniformly, from the earliest times, Courts of Equity have relieved against mere errors of examiners, commissioners, witnesses, solicitors and counsel, and when, there has been an accidental defect in evidence, have, before the hearing, at the hearing, and at the re-hearing of a cause, allowed the defect to be supplied. In *Bloxton* v. *Drewit* (*f*) an order was made to prove a deed *vivâ voce:* it turned out that the attesting witnesses were dead, and leave was given, at the hearing, to prove the deed. In *Spence* v. *Allen*, (*g*) after depositions had been suppressed, because they were leading, which was the error of [134] counsel, leave was given to file new interrogatories; and a

When letters containing admissions, and necessary to be put in issue, came into possession of the defendant after answer, he was obliged to file a cross-bill to put them in issue; Houlditch *v.* Donegal M. of, 1 Moll. 364.]

(*a*) As in Jackson *v.* Parish, 1 Sim. 505; and see the cases cited there.

(*b*) Clarke *v.* Jennings, 1 Anstr. 173; Williamson *v.* Hutton, 9 Pri. 194; see Standen *v.* Edwards, 1 Ves. 133; Stace *v.* Mabbott, 2 Ves. 552; Gage *v.* Hunter, Dick. 49.

(*c*) Greenwood *v.* Parsons, 2 Sim. 229.

(*d*) Asbee *v.* Shiply, 5 Mad. 464.

[In a suit to perpetuate testimony, further examination of witnesses, as to facts lately discovered, was refused, on the ground that a demurrer to a supplemental bill for the same purpose had been allowed; Knight *v.* Knight, 1 Jac. & W. 165.]

(*e*) 4 Sim. 101. [For other and later cases, *vide infra*.]

(*f*) Prec. in Ch. 64.

(*g*) Ibid. 493.

similar leave was given in the case of *Lord Arundel* v. *Pitt.* (*a*) In the case of *Griells* v. *Gansell* (*b*) a deposition had been taken, erroneously, by the examiner, or through mistake of the witness, and leave was given to correct the mistake. And in two instances, in the case of *Kirk* v. *Kirk*, (*c*) where witnesses had made mistakes, the mistake was corrected; in one instance, on the application of the defendant, in the other, on the application of the witness. In *Shaw* v. *Lindsey*, (*d*) and in *Ferry* v. *Fisher*, (*e*) there cited, the Court relieved against the error of commissioners in taking depositions: and, though it suppressed the erroneous depositions, directed the witnesses to be examined over again. In *Lord Cholmondley* v. *Lord Clinton* (*f*) where the intention was to examine witnesses properly, and, by mistake of the solicitor, an error happened, the Court relieved; and Lord Eldon said it was clear the Court had an undoubted right to rectify a mere slip in its proceedings. Lord Eldon indeed says, in *Willan* v. *Willan*: (*g*) "After publication previous to a decree, you cannot examine witnesses further, without great difficulty, and the examination is generally confined to some particular facts." But this shows Lord Eldon's opinion that leave might be given in a proper case. In *Wallis* v. *Hodgson*, (*h*) Lord Hardwicke, after he had gone through the hearing of a cause, postponed it, and gave leave to exhibit interrogatories to prove the sanity of the testator. It appears, from the report, that he thought it a mere matter of form. (*i*) In *Banks* v. *Farquharson*, (*k*) Lord Hardwicke, before the hearing of a cause, adjourned it, in order that a deed might be proved, which could not be proved merely as an exhibit. In *Sandford* [135] v. *Paul*, (*l*) Lord Thurlow, on motion before the hearing, where a mistake had happened, allowed a witness, who had been examined, to be re-examined. In the *Attorney General* v. *Thurnall*, (*m*) on motion at the hearing, leave was given to

(*a*) Ambl. 585.
(*b*) 2 P. Wms. 646.
(*c*) 13 Ves. 280, 285.
(*d*) 15 Ves. 380.
(*e*) Cited ibid. 382.
(*f*) 2 Mer. 81.
(*g*) 19 Ves. 590; [S. C. Coop. 291; see 2 Dow, 274.]
(*h*) 2 Atk. 56; 1 Russ. 526, note.
(*i*) 2 Atk. 56.
(*k*) Ambl. 145; 1 Dick. 167.
(*l*) 3 B. C. C. 370.
(*m*) 2 Cox, 2.

enter into further evidence, so as to let in the copy of a will. In *Walker* v. *Symonds* (*a*) leave was given, on a re-hearing, to read exhibits not proved at the hearing. In *Cox* v. *Allingham*, (*b*) upon petition, after the hearing, leave was given to enter into new evidence, as to the loss of a deed; so as to let in evidence of a copy. In *Moons* v. *De Bernales*, (*c*) and *Abrams* v. *Winshup*, (*d*) upon application in the course of the hearing, leave was given to enter into further evidence as to the death of a person and the sanity of a testator: and in *Williams* v. *Goodchild*. (*e*) Lord Eldon expressed an opinion that, on a re-hearing, upon special application, new evidence might be received. In *Williamson* v. *Hutton* (*f*) the Court of Exchequer permitted a re-hearing on the ground of new evidence, discovered since the hearing; and gave leave, not merely to prove exhibits *vivâ voce*, but to exhibit interrogatories to prove them. In *Coley* v. *Coley*, (*g*) the Chief Baron, when the cause was set down for hearing, gave leave, on motion, to examine two further witnesses to a will, when one only had been examined; and though in *Wyld* v. *Ward*, (*h*) he would not allow proof of the lease, at the re-hearing, unless it could be proved as an exhibit, his reason seems to have been that he thought the omission to prove it at the hearing, arose from mere neglect, not accident, but blameable neglect. (*i*) In the principal case leave was given to exhibit interrogatories to prove a will, which was not the subject of dispute in the cause, and of which the proof had been omitted "only through the slip of counsel." The opposing arguments, commenting upon most of the cases cited above, are well worthy of attention. (*k*)

Every motion, after publication, for the re-examination of a witness who has already given his evidence, (*l*) must be founded

Re-examination of a witness,

[136]

(*a*) 1 Mer. 37, n.
(*b*) Jac. 337.
(*c*) 1 Russ. 307.
(*d*) Ibid. 526.
(*e*) 2 Russ. 91.
(*f*) 9 Price, 187.
(*g*) 2 You. & Jerv. 44.
(*h*) Ibid. 381.
(*i*) [*Ut vide supra*, p. 196, n. (*b*).]
(*k*) [How certain defects and omissions are supplied by further examinations, we shall have further occasion to treat, in considering the cases of — Where the Court requires further information; *infra*, P. III. ch. 5.]
(*l*) [A suit having been dismissed in the Exchequer, but without prejudice at law, or in equity; held that in a new suit in Chancery, the parties might examine new witnesses and re-examine former witnesses; Anon, 1 Ch. Ca. 155.]

in case of accident or surprise.

upon one or the other of the above two grounds [viz. accident or surprise]. The rules are the same whether he is to be examined before the hearing or on a reference to the Master. If he has merely gone through the form of proving exhibits, no motion is necessary: (*a*) for he will not incur the danger which it is the specific object of the rule to avoid, namely, "the danger of perjury, which would be incurred by a witness deposing a second time to the same fact, after having seen where the cause pinched, and how his testimony bore upon it." (*b*)

But whenever any thing more than this formal examination has taken place, the Court requires an application to be made. Sir John Leach indeed, when Vice Chancellor, in one case "held that the Master may, without order, examine to different matters a witness who had been examined before a decree, but not to the same matters; and that the Court will not make such an order unless in cases of accident or surprise." (*c*) But Lord

(*a*) Courtenay *v.* Hoskins, 2 Russ. 254, is an authority that he may prove other exhibits, at least, without a motion. [*Et vide supra*, p. 193, n. (*c*).]

(*b*) Lord Thurlow, in Vaughan *v.* Lloyd, 1 Cox, 313; and see Birch *v.* Walker, 2 Sch. & Lef. 516; Sandford *v.* Paul, 1 Ves. 399; Greenaway *v.* Adams, 13 Ves. 360. [Wherever a re-examination of witnesses might open the way to perjury it is refused; Rolt *v.* Birch, 5 Mad. 66.]

(*c*) Swinford *v.* Horne, 5 Mad. 379. [For the form of order in the Exchequer for the re-examination, after decree, of witnesses who had been examined in chief, see Manson *v.* Burton, 2 Yo. & C. 647. In the Exchequer the re-examination of witnesses, who had been examined in chief, was not a mere motion of course, but the Court, to guide its discretion, required affidavits as to the grounds of the intended examination; and why, if material to the cause, it was not entered into in the course of the proceedings before the decree; Jones *v.* Thomas, 3 Yo. & C. 455. Where the witnesses had been examined generally as to the occupation and perception of titheable matters, upon sufficient affidavits, the Court (of Exchequer) ordered the witness to be re-examined as to the produce of the farm, and quantities of titheable matters taken, Maton *v.* Haytar, 3 Yo. & C. 457. Two witnesses to whom an interrogatory was exhibited by the Examiner, with respect to certain drafts of deeds, then produced to them, were unable to answer the particulars of the interrogatory, by reason of their not having had an opportunity of previously inspecting the drafts. The witnesses having afterwards inspected the drafts, an application was made that they might be re-examined to the same interrogatory; the Court (on satisfying itself, by inspection of the depositions already taken, that the former examination was nugatory, in consequence of such want of inspection,) allowed it; the other party having liberty, however, to cross-examine; Stanney *v.* Walmsley, 1 Myl. & C. 361. And, in the Court of Chancery in Ireland, an application being made for leave to re-examine a witness to correct a mistake, involving the contradiction of a material fact, the order was made, with a direction that the Examiner should certify specially as to the circumstances; Byrne *v.* Frere, 1 Moll. 396.]

Thurlow held very different language; he said, "A witness is not to be re-examined before a Master upon the same interrogatory upon which he has been examined in chief; yet I should have thought upon a substantially different interrogatory he might; but I find it cannot be done without leave." (*a*) And in the case of *Vaughan* v. *Lloyd*, (*b*) he entered fully into the law on the subject; "The first question is whether in any case a witness who has already been examined in the cause, can be again examined before the Master without leave of the Court had for that purpose; and this is a dry point of practice. Now if the witness has been examined only to trifling facts in the cause or if in truth he knows more than he has already been [137] examined to, it would most certainly be very hard to prevent the party from having the benefit of his testimony before the Master. But the question is, whether the Court has not taken the precaution of making it necessary for the party in that case to apply for leave of the Court?—which leave the Court will certainly grant wherever the substantial justice of the case requires it, but will put the party under the terms of having the interrogatories approved and settled by the Master, who in so doing will take care that the same witness is not a second time examined to the same facts; not only to prevent the parties being loaded with unnecessary expense, and the cause with useless depositions, but what is still a greater object, to avoid the danger of perjury, which would be incurred by a witness deposing a second time to the same fact, after having seen where the cause pinched, and how his testimony bore upon it. Let these depositions therefore be suppressed, and let the witnesses be examined again upon interrogatories to be settled by the Master; but I will not insert in the order any directions that they should not be examined on the same points, for that the Master will take care of. Such a direction was inserted in the order of *Browning* v. *Barker*, but I much doubt whether it was proper." Lord Eldon took the same view of the subject,

Re-examination of a witness,—before the Master,

by leave of the Court;

the interrogatories settled by the Master;

who will see the witness is not again examined on the same points.

(*a*) In Sawyer *v.* Bowyer, 1 B. C. C. 388, 2 Dick. 639; and see Browning *v.* Barton, 2 Dick. 508; Smith *v.* Althus, 11 Ves. 564; Purcell *v.* Macnamara, 17 Ves. 434.

(*b*) 1 B. C. C. 388, note, 1 Cox, 312.

[EXAMINATIONS TO IMPEACH THE CREDIT OF WITNESSES.]

There remains for our consideration a class of cases, in which an examination has been allowed, to impeach the credit of witnesses.

Evidence to impeach credit is in one shape or other admitted into almost every system of jurisprudence. One of the grievances in the Star Chamber was that they would not allow it there. (*a*) It was at that time, and still continues, frequent in the Ecclesiastical Courts. (*b*) At Common Law a party may bring forward witnesses to swear that, upon the score of general character, they will not believe the oath of an adverse witness who has given his testimony, or that they have heard him at other times represent differently some fact to which he has sworn; (*c*) but in the latter case the most ample notice possible must have been given to him, in his cross-examination, as to the particular points upon which witnesses are about to be called to contradict him. (*d*)

At Common Law.

[140]

(*a*) See Hudsons' Treatise, in 2 Collect. Jurid. 201.

(*b*) The civilians allowed three probatory terms, the second to invalidate the testimony of the witnesses examined in chief in the first, and the third to restore their credit by further evidence, the maxim being, "*In testem testes, et in hos, sed non datur ultra.*" Hinde Ch. Pr. 373, who adds, "The Court of Chancery in its primæval institution adopted nearly the same line of practice which the civilians had previously established."

(*c*) In the Ecclesiastical Court the credit of a witness may be impeached, by shewing him to have made statements, out of Court, contrary to what he has sworn; Locke *v.* Denner, 1 Add. R. 360-1; and see Atkinson *v.* Atkinson, 2 Add. R. 484; Chapman *v.* Parson, 3 Phill. R. 372. As to the character of witnesses, and at what stage in the Ecclesiastical Courts it may be inquired of, see Robins *v.* Wolseley, 2 Lees, 421; Chapman *v.* Whitby, 3 Phill. R. 372; Evans *v.* Knight, 1 Add. R. 143.]

(*d*) See these rules discussed at great length in 1 Phil. on Ev. the latter part of ch. 8, [9th edit. p. 430, *et seq.*;] and see Ewer *v.* Ambrose, 3 B. & C. 746. [At law a witness cannot be examined as to what another witness said, on occasions other than that which is the subject of the trial; R. *v.* St. George, 9 C. & P. 483. What a witness has said, at other times, is only matter for the cross-examination of the witness himself; ib. Where, in order to discredit a witness, he was asked as to his language used towards his father; it was held, that on re-examination, he might be asked as to the conduct of his father towards himself; H. 488. Evidence of statements made by a witness on other occasions, relevant to the matter in issue and inconsistent with his testimony on the trial, are always admissible, whether parol or written; in the former case he must be asked whether he ever said, so and so, &c. to such a person (naming him) or under such and such circumstances, (mentioning them sufficiently to fix the occasion); in the latter, the writing must be put into his hand, and he may be asked if it is his handwriting;

In Equity the different form of the proceedings causes a considerable difference in the process of impeaching credit. There is not the same tendency to put a stop to a series of questions which are consuming the time of the Court and are often little better than irrelevant; consequently more latitude is allowed in the topics of examination. (*a*) And instead of requiring a cross-examination as a preliminary, the Courts of Equity require Articles, or Exceptions, to be filed, (*b*) and a special motion to be made upon a certificate of that having been done. (*c*)

In Equity.

Articles or exceptions being filed, and motion made.

Such examinations are not however encouraged in equity. [By an Order in 16 Jac. 1, of 29th of January, 1618-19, Bacon, J., No. 72, "No Examination is to be had of the credit of any witness, but by special order, which is sparingly to be granted."(*d*)] And, by an Order of 22nd of May, 1661, Clarendon, C., [literally following one in 1649,]—"The Examiner shall not examine any witnesses to invalidate the credit of any other witnesses, but by special order of the Court: which is sparingly to be granted, and upon exceptions first put into writing, and filed with the Examiner, without fee, and notice thereof given to the adverse party, or his clerk, together with a true copy of the said exceptions, at the charge of the party so examining." (*e*)

Order 1618-19. Bacon, C.

Order 1661, Clarendon, C.,

but by order, sparingly granted.

if he admits the conversation or writing, no other evidence of it need be given; Crowley *v.* Page, 7 C. & P. 789. Where upon cross-examination of a witness, with a view to discredit him, he was asked, if he would not swear, he had said so and so, he replied he would not swear; held, that the party could not be called to discredit him, unless he swore positively to the fact; Long *v.* Hitchcock, 9 C. & P. 619. Where a witness on cross-examination denies having made a particular statement, and a witness is called to prove he did, the particular words cannot be put; but the witness must be asked what passed; Hallett *v.* Cousins, 2 Moo. & R. 238.]

(*a*) See Gill *v.* Watson, 3 Atk. 522.

(*b*) If in a town cause, with the Examiner; if in a country cause, with the six clerk; [White *v.* Fussell, 19 Ves. 127; but now, with the clerk of records and writs, by Order of 26th Oct. 1842, No. 3; Sand. Ord. 916;] they are annexed to the depositions in the office. Hinde's Ch. Pr. 274. Sir S. Romilly speaks of a different practice, in Paris *v.* Paris, 8 Ves. 325.

(*c*) It is not always necessary to support this motion by affidavits; Russell *v.* Atkinson, Dick. 532; Watmore *v.* Dickenson, 2 Ves. & Bea. 267.

(*d*) [Sand. Ord. 118.]

(*e*) Bea. Ord. 188; [Sand. Ord. 302, *et* ibid. 228.] Under this last order, evidence to credit taken upon the examination in chief will be suppressed as impertinent; Mill *v.* Mill, 12 Ves. 406. [The Court of Chancery of Ireland will not allow articles to impeach the credit of a person who has sworn an affidavit, unless the articles of impeachment are ready and produced in Court; Roe *v.* Ashford, 1 Hog. 127.

It may be as well to notice here that it is too late to move to suppress

Form of the articles.

The form which is given in *Hinde's Chancery Practice*, (*a*) and has been copied into later works, is the following:

"Articles exhibited by G. S. complainant, in a certain "cause now pending, and at issue, in the High Court "of Chancery, wherein the said G. S. is complainant, "and W. S. defendant, to discredit the testimony of
[141] "G. T., E. A., and C. A., three witnesses examined "before J. M. Esq., (*b*) one of the Examiners of the "said Court, on the part and behalf of the said defend- "ant.

"1st. The said G. S. doth charge and allege that the said "G. T. hath since his examination in the said cause, "owned and acknowledged, that he is to receive or be "paid, and also that he doth expect, a considerable re- "ward, gratuity, recompense, or allowance, from the "said defendant, in case the said defendant recovers in "the said cause, or the said cause be determined in his "favour. And that the said G. T. is to gain or lose by "the event of the said cause. (*c*)

"2nd. The said G. S. doth charge and allege, that the "said E. A. and C. A., are persons of bad morals, and "of evil fame and character, and that they are generally "reputed and esteemed so to be. And that the said "E. A. and C. A. are persons who have no regard to "the nature or consequence of an oath. And that they "are persons whose testimony is not to be credited or "believed." (*d*)

depositions, for any irregularity, after having exhibited articles to discredit the witness; Malone v. Morris, 2 Moll. 324.]

(*a*) [Hinde's Ch. Pr. 374-5; and see Dan. Ch. Pr., by H., 950.]

(*b*) Or "examined by virtue of a commission issued out of the said Court, to W. W. and others, directed for the examination of witnesses in the said cause upon certain interrogatories exhibited before them for that purpose; and which said witnesses were examined in the said cause on the part and behalf of the said defendant."

(*c*) [Incompetency on the ground of interest, it may be observed, was always distinct from that objection to credit which is here alleged. The former objection has been almost entirely removed, by stat. 6 & 7 Vict. c. 85, *vide infra*, P. II. ch. 3, s. 4. But nevertheless, the objection as to credit, even the Legislature could not remove wholly; it results from the very nature of man.]

(*d*) [So although what is called infamy, as an objection to competency, is now removed, by stat. 6 & 7 Vict. c. 85; yet, as an objection to credit it must for ever remain.]

The matter contained in these articles requires our consideration. Lord Eldon, in *Carlos* v. *Brook* (*a*), said, "The Court, attending with great caution to an application to permit any witness to be examined after publication, has held, where the proposition was to examine a witness to credit, that the examination is either to be confined to general credit, that is, by producing witnesses to swear, that that person is not to be believed upon his oath; or, if you find him swearing to a matter not in issue in the cause, (and therefore not thought material to the merits,) in that case, as the witness is not produced to vary the case in evidence by testimony that relates to matters in issue, but is to speak only to the truth or want of veracity with which a witness had spoken to a fact not in issue, there is no danger in permitting him to state that such fact, not put in issue, is false; and, for the purpose of discrediting a witness, the Court has not considered itself at liberty to sanction such a proceeding as an examination, to destroy the credit of another witness, who had deposed only to points put in issue. In *Purcell* v. *M'Namara* (*b*), it was agreed, that after publication it was competent to examine any witness to the point, whether he would believe that man upon his oath. It is not competent, even at law, to ask the ground of that opinion: but the general question only is permitted. In that case the witness went into the history of his whole life; and as to his solvency, &c. It was not at all put in issue whether he had been insolvent, or had compounded with his creditors: but, having sworn the contrary, they proved by witnesses, that he, who had sworn to a matter not in issue, had sworn falsely in that fact; and that he had been insolvent and had compounded with his creditors; and it would be lamentable if the Court could not find means of getting at it; for he could not be indicted for perjury, though swearing falsely; the fact not being material. The rule in general cases is, that the cause is heard upon evidence given before publication; but that you may examine after publi-

Matter of the articles.

[142]

(*a*) 10 Ves. 49; and see Purcell v. Macnamara, 8 Ves. 327; and Wood v. Hammerton, 9 Ves. 145; Piggot v. Croxhall, 1 S. & S. 469; [White v. Fussell, 1 V. & B. 151; S. C. 19 Ves. 127.]

(*b*) [8 Ves. 327.]

cation, provided you examine to credit only, and do not go to matters in issue in the cause, or in contradiction of them, under pretence of examining to credit only. These depositions," he continued, "appear to me material to what is in issue in the cause; and therefore must be suppressed."(*a*)

As to the above form.

It will have been observed, that the second of the articles quoted above refers to general credibility. (*b*) The language cannot be too general. If particular facts are mentioned, in the articles or in affidavits supporting them, or are inquired into by the subsequent interrogatories, they may be suppressed as scandalous. (*c*) This is on the principle of Lord C. J. Holt's exclamation, "Look ye, you may bring witnesses to give an account of the general tenor of the witness's conversation; but you don't think, sure, that we will try, at this time, whether he be guilty of robbery." (*d*)

[143]

In the first of the articles quoted above the beginning was most probably levelled against a deposition of the witness in his examination, denying that he expected any reward. (*e*) The end of it could not be made a foundation for interrogatories, for it could only affect the *competency* of the witness, which ought to be impeached by a different course of proceedings. (*f*)

The time for examining to credit.

An examination to credit may take place at any time prior to the hearing: (*g*) before publication, (*h*) or even several months after. (*i*) But in the latter case care will be taken that they are not used for the purpose of delay (*k*); and for that reason a commission to foreign parts will not be granted.

(*a*) [10 Ves. 49.]

(*b*) [As to the circumstances which affect the credit to be given to a witness; see Watkyns *v.* Watkyns, 2 Atk. 97, and some observations hereafter.]

(*c*) [The only question is, whether the witness is to be believed or not.] Anon. 3 V. & B. 93; yet see Gill *v.* Watson, 3 Atk. 522. [That depositions, as to credit, may be referred for scandal or impertinence, see Bray *v.* Bulkby, Dick. 288, and Mill *v.* Mill, 12 Ves. 406.]

(*d*) In Rookwood's case, 13 How. St. Tr. 211.

(*e*) As in Paris *v.* Paris, Rolls, 1801, cited 8 Ves. 315.

(*f*) Lord Hardwicke in Callaghan *v.* Rockfort, 3 Atk. 643; *ut supra*, p. 206, n. n. (*c*) (*d*); and *vide infra*, P. II. ch. 3, s. 4. [As to reading the depositions of a witness made in another cause, or before another Court, for the purposes of confronting his evidence, see Anon. Mose, 118, and Mackworth *v.* Pearson, Dick. 50.]

(*g*) White *v.* Fussell, 1 Ves. & Bea. 151.

(*h*) Boning *v.* Sprott, in the Exch., Bunb. 46; 2 Eq. Ca. Abr. 397, note.

(*i*) [Wood *v.* Hammerton, 9 Ves. 145; White *v.* Fussell, 19 Ves. 127; Piggott *v.* Croxhall, 1 S. & S. 467; and see Malone *v.* Morris, 2 Moll. 324, and Kirkland *v.* Smith, 1 Hog. 397.]

(*k*) See White *v.* Fussell, 19 Ves. 127; Pigott *v.* Croxhall, 1 S. & S. 467. It was refused, as too late, within a week of the hearing, in Gill *v.* Watson, 3 Atk. 522.

Lord Hardwicke said, "The Court will allow such articles to credit after publication, because the matters examined to in such cases were not material to the merits of the cause, but only relative to the characters of the witnesses; and yet no commission was ever granted into foreign parts to support such articles,—because this would introduce a certain method of delay; and if it was ever to be granted upon great necessity, and in a case of consequence, the only ground of it must be, that no person in England could swear any thing as to the witness's credit: but," he added, "the affidavit which has been read in this case to induce me to grant the commission is silent as to this, so that there may be persons here who can speak both for and against the credit of the witness." And as there was no absolute necessity in this case he denied the motion. (*a*)

Commission to examine abroad to support such articles,

when granted.

[144]

When an examination to impeach credit is allowed, counter evidence may be given to support it, (*b*) and for this purpose hearsay evidence becomes admissible, to corroborate the testimony of the witness by showing that he had affirmed the same thing before on former occasions and that he is still consistent with himself. (*c*)

Counter-evidence to support credit.

The circumstances must be very special indeed under which a party could be allowed to impeach the credit of his own witness, except by examining additional witnesses, as ordinary evidence, regarding the proposition which he has sworn. (*d*)

The party's own witness.

Where a special order had been made that a defendant should be examined on interrogatories, a motion for a commission to examine witnesses in order to falsify the defendant's statements, was refused, although the Master had certified that he thought it reasonable. (*e*)

A defendant.

(*a*) Callaghan *v.* Rochfort, 3 Atk. 643. [A commission to examine to credit should be executed before decree. Costs given on that ground, White *v.* Fussell, *et supra*.]

(*b*) Ambrosio *v.* Francia, 8 Ves. 324.

(*c*) Gilb. on Ev. 153, citing Luttrell *v.* Reynell, 1 Mad. 283.

(*d*) See Purcell *v.* Macnamara, 8 Ves. 327; Hinde's Ch. Pr. 377. [In Equity the occasion cannot seldom occur; but, it may be observed that, at law, a party is not allowed to discredit his own witness: so where a party has placed a witness in the box as a witness of credit, he cannot be impeached, by calling witnesses to show that he has given a different account; and it makes no difference that the fact is elicited upon cross-examination; Holdsworth *v.* Dartmouth M. of, 2 Moo. & R. 153.]

(*e*) Smith *v.* Turner, 3 P. Wms. 413.

[EXAMINATION OF A DEFENDANT. (*a*)]

Defendant, after third insufficient answer, how examined.

If a defendant [for a third time,] puts in an insufficient answer, the Court resorts to an anomalous expedient, viz. ordering him to be examined, upon interrogatories, before the Master, to the points insufficiently answered. (*b*) The practice is borrowed from the civil law, by which a man was examined three times upon the *libellus articulatus;* and if he did not answer to the satisfaction of the Judge, he was contumacious, and it was either taken *pro confesso*, or he was obliged to answer in custody; and "hence it was with us, if three insufficient answers were put in, the defendant was obliged to answer *in vinculis.*" (*c*) An Order of 3rd April, 1828, Lyndhurst, C., No. 10, slightly altering the former ones, runs thus:

Order of 1828, Lyndhurst, C.

[145]

"That upon a third answer being reported insufficient, the defendant shall be examined upon interrogatories as to the points reported insufficient, and shall stand committed until such defendant shall have perfectly answered such interrogatories: and shall pay, in addition to the £4 costs heretofore paid, such further costs as the Court shall think fit to award." (*d*)

This process has been very rarely used. (*e*) Among the few reported instances are the two following. In *Gower* v. *Baltinglass*, a very remarkable case, "The bill was to discover a writing which it was supposed the defendant had concealed, she having gotten a trunk of writings by a trick from a Master of the Court. The defendant had put in four insufficient answers, and delayed the plaintiff eight years; and upon the fourth insufficient answer was ordered to be examined upon

(*a*) [This being but slightly relevant to our subject, we refer the reader to Dan. Ch. Pr., by H., 739; and as to a third examination found insufficient, ibid. 1134.]

(*b*) [This is by an Order of 30th April, 1701, Sir Nathan Wright, K., which, see Sand. Ord. 421; where, see the earlier orders on this subject referred to.]

(*c*) Gilb. For. Rom. 97.

(*d*) [Sand. Ord. 714.]

(*e*) [And that examination of a defendant upon interrogatories should only be used "in a very special case, &c.," see an Order of 29th Jan. 1618-19, Bacon, C., No. 70; Sand. Ord. 118.]

interrogatories; and now, upon motion, ordered that one of her counsel should attend, in the next room, when she was examined, to advise her in any matters of law, if she should need it. And afterwards on another day, ordered on debate, that her counsel should see the interrogatories, but not have a copy." (*a*) The subject was brought before the Court in several shapes in *Farquharson* v. *Balfour*, (*b*) a case which deserves great attention. Lord Eldon there directed that the interrogatories should be referred to the Master to be settled, care being taken that they went directly to the points to which the exceptions had been sustained. The defendant was in the meantime kept in mitigated custody, whence he was brought before the Master and examined personally, but he was allowed to be attended by counsel, and to take with him a written paper containing, at full length, the answers which he had been advised to give. (*c*)

(*a*) 1 Ch. Ca. 66. And see Clotworthy *v.* Mellish, 1 Ch. Ca. 279; Hawkins *v.* Croke, Mos. 383; Anon. 1 Vern. 187, where a commission was granted.

(*b*) T. & R. 184.

(*c*) [On a plea found false plaintiff is entitled to a decree, and, if discovery is necessary, to examine defendant on interrogatories; Wood *v.* Strickland, 2 V. & B. 158.]

[146]

PART THE SECOND.

THE RULES BY WHICH THE COURT EXCLUDES EVIDENCE.

Of the mass of evidence collected as we have seen in the preceding chapter, it often happens that a very small portion has any effect on the ultimate decision. (*a*)

Evidence not read or put in.

In the first place, the Court takes no notice of any evidence that is not read or put in, that is to say, ostensibly used, by the parties, and entered in the Registrar's book. (*b*) In the Ecclesiastical Courts the whole is considered to be put in, and the Judge frequently reads it before the hearing; but when Lord Brougham, a few days after he received the seals, mentioned at the hearing that he had looked over the evidence, he was met with a strong remonstrance from the counsel, who urged that much of that which he had read and which had probably given his mind a bias, might very likely never be offered as evidence in the cause, while much of it might possibly be objected to and suppressed.

Modes of excluding evidence.

In the second place, certain rules have been laid down for the exclusion of evidence, under a variety of circumstances; which rules may be appealed to either by motion to suppress depositions before the cause is heard, or by the counsel when an attempt is made to use them at the hearing.

(*a*) [As to Admissions *Constructive* and *Actual* more or less precluding the necessity for evidence, or available as evidence, *vide supra*, p. 8, *et seq.* It is observed by Mr. Daniells, in his work on Chancery Practice, "There is a great difference between *actual* and *constructive* admissions, with respect to the manner in which they are presented to the Court: the former are read to the Court to substantiate the case of the party reading them, in the same manner as the proofs in the cause; the latter are presented to the Court, at the outset of the hearing, by the counsel opening the pleadings, for the purpose of showing what the matters in issue between the parties are." 2 Dan. Pr. Ch. 397, in 2nd edit. by H., 802.]

(*b*) When it is not disputed, it is generally entered as read by the Registrar at his office. [And of the necessity for due care, to see that the Registrar duly enters all the evidence used at the hearing, see Stubbs *v.* ——, 10 Ves. 30; Eden *v.* Bute Lord, 1 B. P. C. 465, and the further observations below on Evidence on Re-hearings and Appeals. By an Order of 20th Dec. 1833, the form of an original decree contains "a description of the evidence read;" Sand. Ord. 789. In general, evidence to meet a case which has not been opened cannot be entered as read; but when the relief prayed for, though not opened, might authorize the Court, on further directions, to direct an inquiry on the subject, the evidence may be entered; Crawford *v.* O'Sullivan, 2 Con. & Law. 410.

The costs of documentary evidence not read, nor entered as read, disallowed, in Stuart *v.* Greenall, 1 M'Cl. 705; S. C. 13 Pri. 755.]

CHAPTER I. [147]

SUPPRESSION OF DEPOSITIONS.

IMMEDIATELY after publication has passed, it is the duty of the solicitor to examine carefully the evidence of the adverse party, and to ascertain whether any of it is objectionable. (*a*)

Examination of depositions with a view to objections.

He may find some parts which he would not wish to remain on record, for other reasons besides [objecting to] their use in the suit; containing, for instance, scandalous matter. (*b*) He may discover that to other parts, or even to the whole of it, some latent objection applies, which might be brought before the Court on affidavits; as in many cases of irregularity in taking the examination. (*c*) And even when on the face of the proceedings he sees an objection which might be raised when the cause is heard, it may be such a one as would only induce the Court to give time for filing new interrogatories, and it may be better to have the point determined before labour and expense have been incurred, in preparing the cause for the hearing. In either of these cases his course will be to apply to the Court, [by motion,] for an Order to suppress the depositions.

Motion to suppress.

Time for examination.

Between publication and a re-hearing, (and, *pari ratione*, between publication and hearing,) if proved to be necessary, the Court will grant time to examine whether there is anything irregular in the depositions. (*d*)

(*a*) [Or counsel, having before him the copies of interrogatories as well as the depositions annexed (by Orders, see Sand. Ord. 19 and 571) is instructed to advise thereon. If necessary, he will settle and sign exceptions.

If an interrogatory appear to be leading, the Court, on motion of course, will refer it to the Master to look into the interrogatories, and certify whether such is the case; Dan. Pr. Ch. by H., 934-5. Where, see the course to be adopted, by the solicitor, to have all the depositions, taken under such interrogatories, which are leading, suppressed, after having had the interrogatories expunged. In a case where depositions were suppressed, because the interrogatories were leading, leave was given to exhibit new interrogatories, to be settled by the Master; Arundel *v.* Pitt, Ambl. 585. As to interrogatories being leading, *vide supra*, p. 57.]

(*b*) [Not being pertinent or material, else the Court will not expunge it; Gilb. For. Rom. 207. Nor will the Court, before the hearing, entertain any objection against an interrogatory or depositions as merely impertinent, and not also scandalous; *vide infra*. As to scandal and impertinence generally, see Dan. Pr. Ch. by H., 331.]

(*c*) [Of which several instances will be given presently.]

(*d*) Gordon *v.* Gordon, 1 Swanst. 171; 1 Grant's Ch. Pr. 110.

[SECTION L]

[SCANDAL OR IMPERTINENCE].

Order of 1618-19, Bacon, C., as to matter libellous or slanderous, impertinent, or in derogation of the settled authorities of any of her Majesty's Courts.

[By an Order of Jan. 1618–19, Bacon, C., No. 56, "If there be contained in any bill, answer, or other pleadings or interrogatory, any matter libellous or slanderous against any that is not a party to the suit, or against such as are parties to the suit, upon matters impertinent, or in derogation of the settled authorities of any of his Majesty's Courts, such bills, answers, pleadings, or interrogatories shall be taken off the file, and suppressed, and the parties severely punished, by commitment or ignominy, as shall be thought fit, for the abuse of the Court; and the counsellors-at-law, who have set their hands, shall likewise receive reproof or punishment, if cause be." (*a*) And by No. 82 of the same Orders, the then practice as to suppression was regulated. (*b*)

Impertinence, simple; also scandalous;

and also seditious.

It will be perfectly manifest, that of impertinence merely, no person, not a party to the suit, can be heard to complain; but as to scandalous impertinence, any person against whom it is directed has a right to call the attention of the Court to it, and ask relief; (*c*) whilst as to scandalous impertinence "in derogation of the settled authorities of any of her Majesty's Courts," (*d*) the Court itself, *ex officio*, will take notice of it, even though no party or other person should.

Which any *party*, which any *person*, may object to

The Orders, we are about to cite, repeatedly advert to this distinction; between a "party" to the suit, and any other "person" complaining of that impertinence, which is also scandalous.]

Reference for scandal.

On a suggestion that the interrogatories or depositions are scandalous, [prior to the late Orders] it was a matter of course, to refer them to the Master to report whether [there was] matter of that description contained in them. (*e*)

(*a*) [Sand. Ord. 117.]
(*b*) [Sand. Ord. 119-20.]
(*c*) [Coffin *v.* Coffin, 6 Ves. 514, but *contrà*, Anon. 4 Mad. 252.]
(*d*) [See the Order cited above, and Sand. Ord. 117.]
(*e*) Eastham *v.* Liddell, 12 Ves. 201; Bray *v.* Bulky, Dick. 288; and see the cases cited in Osmond *v.* Tindall, Jac. 626; [and so Dan. Pr. Ch. by H., 936.]

As to scandal, [148] or other impertinence.

This is allowed out of decency, and for the honour of the Court, which will not suffer anything scandalous or impertinent to stand on the proceedings; and likewise for the sake of the party [the person alluded to,] that nothing reflecting upon his character may appear. (*a*)

Old practice.

Formerly, if the Master certified against them, a motion was made to indorse them "suppressed," or to strike out the objectionable part, upon which motion the sense of the Court was taken; [and then] the Master was empowered, [by an Order of 21st Dec. 1833, Brougham, C., No. 22, (*b*),] to expunge scandal or impertinence in four days after his report; the proper method for bringing the matter before the Court [was] for the party who defended the interrogatories to file exceptions.

[Indeed, as to all matter necessary to be put in issue, the Court requires that the same shall be expressed fairly, and not in a scandalous and libellous manner. (*c*)

New practice.

The orders of May, 1845, upon this subject, are as follows. By No. 38, "No order is to be made for refusing any pleading, or other matter depending before the Court, for scandal or impertinence, unless exceptions are taken in writing, and signed by counsel, describing the particular passages which are alleged to be scandalous or impertinent." (*d*)

Exceptions, form of.

Old orders superseded.

This, and the others of the Orders of May, 1845, on this subject, to which we shall proceed to advert, wholly supersede the prior Orders, namely those of 3rd April, 1828, Nos. 11 and 12, (*e*) and that of 21st Dec. 1833, No. 22, (*f*) which formed the basis of Mr. Gresley's text. (*g*)

Exceptions, filing of;

By an Order of 26th Oct. 1842, No. 5, "All exceptions for scandal, impertinence, and insufficiency, shall be filed with the clerk of records and writs in whose division the cause may be. (*h*)

(*a*) Further, [as to the principle upon which the Court suppresses scandalous impertinence,] see the *dicta* of Lord Hardwicke, C., in Cox *v.* Worthington, 2 Atk. 236, and of Lord Mansfield, C., in Da Costa *v.* Jones, Cowp. 736; see also Coxe *v.* Phillips, Rep. t. Hard. 237.

(*b*) [Sand. Ord. 780. But this order is expressly superseded, by Order of May, 1845, No. 1; Sand. Ord. 982.]

(*c*) [See an Order of 27th June, 1635, by Lord Coventry, K., in Reynell *v.* Yard, Sand. Ord. 173.]

(*d*) [Sand. Ord. 998.]

(*e*) [Sand. Ord. 715.]

(*f*) [Sand. Ord. 780-1, *et supra*.]

(*g*) [By an Order of May, 1845, No. 1, Sand. Ord. 981-2; but (by the way) the Order of 3rd April, 1828, No. 73, Sand. Ord. 727-8. As to the course, with regard to scandal or impertinence in any proceedings before him is left unaltered and will be adverted to below.]

(*h*) [Sand. Ord. 917.]

And by No. 24 of the same Orders, "the solicitor of the party (*a*) taking the same, or the party himself if he acts in person, shall leave the same at the Record and Writ Clerk's Office to be filed; and shall, on the same day, give notice of the filing thereof to the solicitor for the adverse party, or to the adverse party himself, if he acts in person." (*b*)

Notice of having filed.

Time for obtaining reference;

By another of the Orders of May, 1845, No. 16, "Times allowed in procedure," s. 6, "Any person or party having filed exceptions to any pleading or other matter depending before the Court for scandal, and any party filing exceptions for impertinence, is to obtain an order to refer the same to the Master within *six days* after the filing thereof. If he does not, the exceptions are to be considered as abandoned, and the costs paid by the exceptant." (*c*) By another Order of the same Orders, No. 39, "Where any person or party having filed exceptions to any pleading or other matter depending before the Court for scandal, and any party having filed such exceptions for impertinence, does not obtain an order to refer the same to the Master within six days after the filing thereof, such exceptions are to be considered as abandoned, and the person or party by whom such exceptions were filed, is to pay to the opposite party such costs as may have been incurred by such party in respect of such exceptions." (*d*)

in default,

exceptions abandoned,

exceptant to pay costs.

Time for obtaining report;

By the Order, No. 16, "Times allowed in procedure," s. 7, "Any person or party having obtained an order to refer exceptions to the Master for scandal, and any party having obtained an order to refer exceptions to the Master for impertinence, is to obtain the Master's report thereon within fourteen days after the date of the order, or within such further time as the Master thinks fit to allow. If he does not, the order is to be considered as abandoned, and the costs paid by the exceptant." (*e*) By another Order of May, 1845, No. 40, "Where any person or party, having obtained an order to refer exceptions to the Master for scandal, and any party having obtained an order to refer such exceptions to the Master for impertinence, does not obtain the Master's report thereon within fourteen days

in default,

(*a*) [Or "person," as to scandal.]
(*b*) [Sand. Ord. 923.]
(*c*) [Sand. Ord. 986.]
(*d*) [Sand. Ord. 999.]
(*e*) [Sand. Ord. 986.]

after the date of the order, or within such further time as the Master thinks fit to allow, the exceptions, and the order referring the same, are to be considered as abandoned, and the person or party by whom such exceptions were filed, is to pay to the opposite party such costs as may have been incurred by such party, in respect of such exceptions, order, and reference." (*a*)

Exceptions deemed abandoned, exceptant to pay costs.

By the Order, No. 16, "Times allowed in procedure," s. 8, "Any person or party objecting to the Master's report that any pleading or other matter referred to him is scandalous, and any party objecting to the Master's report that any pleading or other matter referred to him is impertinent, has four days after the filing of the report, within which he may file and set down exceptions thereto, and serve the order for setting down the same before the scandal or impertinence is expunged. If he does not do so, the scandalous or impertinent matter is to be expunged." And by s. 9 of same Order, "Any person or party objecting to the Master's report that any pleading or other matter referred to him is not scandalous, and any party objecting to the Master's report that any pleading or other matter referred to him is not impertinent, has *four* days after the filing of the report, within which he may file and set down exceptions thereto, and serve the order for setting down the same." (*b*) By another Order of May, 1845, No. 41, "Upon the expiration of four days from the filing of the Master's report that any pleading or other matter depending before the Court is scandalous or impertinent, the officer having the custody or charge of such pleading or other matter is, upon production to him of an office copy of the Master's report, and a certificate that no exception thereto was filed, or an affidavit that no order to set down any such exception was served within *four days* after the filing thereof, to expunge from such pleadings or other matter, such parts thereof as the Master has found to be scandalous or impertinent; and thereupon the person or party requiring such scandalous or impertinent matter to be expunged, is to pay to the officer expunging the same, the same fee as, on the like occasion, has heretofore been paid to the

Objections to report; time for making; proceedings in default, expunging impertinence, at cost of the person or the party requiring it;

(*a*) [Sand. Ord. 999.] (*b*) [Sand. Ord. 986.]

Master." (*a*) By another Order of May, 1845, No. 42, "The Master, having found any pleading or matter depending before the Court to be or not to be scandalous or impertinent, is to direct by whom the costs of, and consequent upon the reference are to be paid." (*b*) And note, the Order of May, 1845, No. 4, as to interpretation, affects all these Orders.]

ultimately of whom the Master, by his report is to direct.

Costs.

There [has been] sometimes a difficulty about the costs. If the interrogatory contains or leads to scandal, of course the party who exhibited it must bear the penalty; but where a witness stated scandalous matter in answer to the last general interrogatory, no costs were given; not against the witness, because its insertion was more the fault of the commissioners, nor against the commissioners themselves, because those of both parties attended. (*c*)

[149]

Reference for impertinence alone,

sometimes; but refused by Lord Eldon.

Lord Hardwicke doubted whether interrogatories or depositions could be referred upon impertinence alone, and ordered the question to stand over till the hearing of the cause. (*d*) There are some instances of it to be found; (*e*) but Lord Eldon refused, alleging the risk of expunging matter which might eventually prove to be material; he added, that he would strike out scandal, as that affects character; but impertinence only affects the purse, and the Court may afterwards set that right. (*f*) In a case in the Exchequer, it was considered to be a waiver of the impertinence that the witnesses had answered the interrogatories; it was held that they ought to have demurred; and the motion was refused with costs. (*g*) In another case in the Exchequer, a suit to redeem, the Master having reported impertinence in an examination put in by the defendants, exceptions were allowed, but the costs were ordered to be costs in the cause. (*h*)

(*a*) [Sand. Ord. 999.]
(*b*) [Sand. Ord. 982.]
(*c*) Anon. 2 P. Wms. 405; but see Irish *v.* Rooke, cited in Harr. Ch. Pr. 515 (ed. of 1790). [The Order of 21st Dec. 1833, Brougham, C., Sand. Ord. 780-81, (which was in the text of last edition,) is now abrogated; and as to costs this also is provided for by the Orders of 8th May, 1845, as in the text.]
(*d*) Pyncent *v.* Pyncent, 3 Atk. 557.
(*e*) Horsey *v.* Horsey, cited 2 Atk. 236; and some cases mentioned in Jac. 626. [Mill *v.* Mill, 12 Ves. 406.]
(*f*) Osmond *v.* Tindall, Jac. 625; and before in White *v.* Fussell, 19 Ves. 113-127. [*Et vide supra* p. 68, n. (*b*).]
(*g*) Jefferis *v.* Whittuck, 9 Pri. 486; one of the witnesses was the solicitor of the adverse party: [But] *contra*, see Ashton *v.* Ashton, 1 Vern. 165; 1 Eq. Ca. Abr. 41; [*et vide supra*, p. 85-6.] And see more concerning impertinence, *infra*, ch. 3, § 1.
(*h*) Balby *v.* Williams, 1 M'Cl. & Y. 334.

[SECTION II.]

[IRREGULARITY.]

Irregularity in taking examinations.

The rules for suppressing examinations on account of irregularity in taking them, are very strict, and may be gathered from the sections in the preceding chapter which treat of the mode of examining witnesses. (*a*) For it may be laid down generally that any deviation from those rules vitiates the proceeding. (*b*) But it will be useful here to give a summary of the reported cases on the subject. The circumstances generally require to be shown to the Court by affidavits; but they often appear from a certificate returned with a commission by the commissioners: (*c*) and they are often manifest on the face of the proceedings themselves. Lord Eldon says, "In whatever way the knowledge of the fact reaches the Court, whether from a commissioner, (and I think it is not incompetent for a commissioner to disclose it,) or from an eaves-dropper, the Court having knowledge of the fact, must act upon it. (*d*) The Court will seldom refuse to allow a re-examination, and will let the cause stand over in the mean time." (*e*)

General rule.

[150]

Re-examination.

Instances of irregularity.

Examinations have been suppressed, (*f*) when they had been taken in London by a commission instead of the Examiners; (*g*)

[Exceptions, on the ground of scandal, may be taken to a bill even by a defendant in contempt. See Anon. 5 Ves. 656; Everett *v.* Prythergh, 12 Sim. 363; Dan. Pr. Ch. by H., 463. *Semble*, the like principle would apply to interrogatories, depositions, and other evidence. As to prolixity, the Order of May, 1845, No. 122, seems inapplicable to evidence, except by affidavits; see Sand. Ord. 1019.]

(*a*) [Pt. 1. ch. 3, p. 52, *et seq.*]

(*b*) [In the Chancery of Ireland depositions are not suppressed before the hearing, unless when the party ought to be allowed to examine over again; Lysaght *v.* Lysaght, 1 Hog. 208. After having exhibited articles to discredit a witness, the party is too late to move to suppress his deposition for irregularity; Malone *v.* Morris, 2 Moll. 324. Motion for suppression of cross-interrogatories for irregularity must be made before publication; Aylward *v.* Hickson, 2 Hog. 1.]

(*c*) [*Ut supra*, p. 108.]

(*d*) [Shaw *v.* Lindsey, 15 Ves. 380,] and see cases cited in Hood *v.* Pimm, 4 Sim. 110.

(*e*) Shaw *v.* Lindsey, 15 Ves. 380.

(*f*) [And in cases of irregularity, where an application is made within a reasonable time after discovery of the objection, the fact of publication, or the death of the witness, will not prevent the suppression; Mostyn Lord, *v.* Spencer, 6 Beav. 135. But see Aylward *v.* Hickson, 2 Hog. 1, *supra*, n. (*b*).

(*g*) And the clerk who made out the commission, was committed for

when no notice of the execution of the commission had been given to the adverse party; (*a*) of a London witness when no notice had been given to the Examiner's clerk of the name of the adverse clerk in Court; (*b*) when the commission had been executed after the return day; (*c*) when the examination had not been carried on in private; (*d*) when a solicitor of one of the parties had acted as a commissioner; (*e*) or the clerk to the solicitor, as clerk to the commissioners; (*f*) when they had been returned so ill written as not to be legible; (*g*) when the solicitor had written down or methodized for the witness what
[151] he was to swear to, and he read it from the paper; (*h*) when

misbehaviour. Gilb. For. Rom. 143; and see Bea. O. 194. [When commission was executed before a Town-clerk instead of commissioners; Haroforth *v.* Gates, Cary, 91.]

(*a*) Mulvany *v.* Dillon, 1 B. & B. 413; Loveden *v.* Milford, 4 B. C. C. 540, where they were depositions, *de bene esse*.

(*b*) Cholmondeley *v.* Clinton, 2 Mer. 81. [This rule, *vide supra*, p. 65.]

(*c*) Anon. 2 Vern. 197. [That no witness should be examined after publication, *vide supra*, p. 70, n. (*a*). An order for the suppression of depositions taken in a cross-cause, without leave of the Court, after publication passed in the original cause, which depositions related principally, although not exclusively, to the matters in issue in that cause, was affirmed on appeal; a reference to the Master to distinguish such parts thereof as did not relate to those matters having been refused; held also that the objection to the evidence could not be reserved till the hearing; Pascall *v.* Scott, 1 Turn. & Ph. 110.]

(*d*) Gazon *v.* Wordsworth, 2 Ves. 336; and see Shaw *v.* Lindsey, 15 Ves. 384. [At law, where a witness remains in Court, after an order that the witnesses shall leave the Court, his testimony is not excluded, it is only matter for observation on his evidence; Chandler *v.* Horne, 2 M. & Rob. 423. Erskine.]

(*e*) Selwyn's case, Dick. 336. [And (the converse case) "one appointed a commissioner is totally unjustified in acting as a solicitor for a party who has to examine witnesses under the commission;" *per* Lord Langdale, M. R., in Sayer *v.* Wagstaff, 5 Beav. 464. And see Wy. Pr. Reg. 121; Fricker *v.* Moore, Bun. 289; Selwyn *v.* Gill, 2 Dick. 563; Cooke *v.* Wilson, 4 Mad. 380. When the nephew and agent of the plaintiff was one of the commissioners; Mostyn Lord, *v.* Spencer, 6 Beav. 135.] Whether the incapacity extends to a Scotch attorney who is prosecuting a branch of the same litigation in the Courts at Edinburgh, *qu.*; Gordon *v.* Gordon, 1 Swanst. 171. It does not extend to the solicitor of a third person interested; Whitelock *v.* Baker, 13 Ves. 513.

(*f*) Newton *v.* Foot, Dick. 793; Nowte *v.* Foot, (S. C.) 2 Ch. Rep. 393. Cook *v.* Wilson, 4 Mad. 380. [When the evidence had been taken by the clerk to the commissioners, and the effect of some of the depositions had been communicated to the agent on the other side; Lennox *v.* Munnings, 2 Y. & J. 483, *et vide supra*, p. 111, n. (*d*). Or a clerk of a party, as clerk to the commissioners; Shaw *v.* Lindsay, 15 Ves. 380. Or the commissioners misbehaved, as in Durham *v.* Newcastle-upon-Tyne, Colles, P. C. 18; and see Morgan *v.* Bowdler, Toth. 40; Dedore *v.* Day, 2 Fowl. 158. Or witness examined by fraud; Walford *v.* Walford, Cary, 56.]

(*g*) Gilb. For. Rom. 148; and see Att. Gen. *v.* Mayor of Fowey, 3 Swanst. 184.

(*h*) For then it was no more than an affidavit, Anon. Ambl. 252; and it is like prompting a *vivâ voce* witness; Shaw *v.* Lindsey, 15 Ves. 382; Ferry *v.* Fisher, cited ibid. [As to how far a witness may use a written document, to refresh his memory, see Dupuy *v.* Truman, 2 Yo. & C. 341. And cases

the interrogatories had been wrongly entitled; (*a*) when a witness had secreted himself before cross-examination; (*b*) when a witness had gone through part of his examination in chief, and had died suddenly without having signed it: (*c*) when a re-examination has been taken before the Master without an order for it; (*d*) when in a re-examination before the Master, the witness had, without a special order been questioned on the same points as at his examination in chief; (*e*) when witnesses had been examined in a supplemental suit as to matters which were in issue before. (*f*) The rules relating to leading interrogatories will be best gathered from a former section. (*g*)

Depositions *de bene esse* were on one occasion suppressed after the witness's death, and the Examiner committed for the "foul irregular way" in which he had taken them. (*h*)

The Court has refused to suppress interrogatories in the following cases. (*i*) When the title of the cause had been

Cases of refusal to suppress for irregularity.

at *Nisi Prius*; Steinkeller *v.* Newton, 9 C. & P. 313; Smith *v.* Morgan, 2 Mood. & R. 259. And in the Ecclesiastical Courts; Butlin *v.* Barry, 1 Curt. 617. An attesting witness to a deed, Wood *v.* Cooper, 1 Carr & K. 645] But the case of Bland *v.* Abp. of Armagh, seems to have decided that the depositions of witnesses may be expressed in literally the same terms with voluntary affidavits sworn by them at the commencement of the suit; 3 B. P. C. 620. [Depositions were suppressed as irregularly taken, being the ready prepared statements of the witnesses; upon the witnesses going again before the Examiner, he merely read them over and asked if they were correct; and they were signed by the witnesses, answering in the affirmative; this was held to be wholly repugnant to the principles of the Court, and the depositions were again suppressed, with costs; Att. Gen. *v.* Nethercote, 10 Sim. 311. As to prompting or communicating with a witness, *vide supra*, p. 67, n. (*e*); see Kelly *v.* French and Sayer *v.* Wagstaff, referred to below.]

(*a*) Perry *v.* Silvester, Jac. 83; [Portchard *v.* Foulkes, 2 Beav. 133. But *contrà*, see Lincoln *v.* Wright, 4 Beav. 164, *vide supra*, p. 59, n. (*b*). Where the words, "or either of them," were omitted in the last interrogatory used, that and the depositions to it suppressed; Peacock *v.* Kernott, V. C. E., 21st Nov. 1845, *ut supra*, p 61, n. (*a*).]

(*b*) Flowerdale *v.* Collett, Dick. 288; Gason *v.* Granger, Dick. 288.

(*c*) Copeland *v.* Stanton, 1 P. Wms. 414.

(*d*) Smith *v.* Graham, 2 Swanst. 264; Birch *v.* Walker, 2 Sch. & Lef. 518: and *vide supra*, p. 201. [In one case where the Master examined one witness three times, to the matter of accounts, ordered that the depositions be suppressed; Anon. 2 Ch. Ca. 79. A second set of depositions, taken upon the same interrogatories, was rejected, in Hadow *v.* Barnett, 1 Yo. & C. 164.]

(*e*) Sawyer *v.* Bowyer, 1 B. C. C. 388; and Browning *v.* Barker, and Vaughan *v.* Lloyd, there cited; Lord Bathurst in Sandford *v.* —, 1 Ves. 400.

(*f*) Bagenal *v.* Bagenal, 6 B. P. C. 86.

(*g*) *Vide supra*, p. 57.

(*h*) Hosier *v.* Hart, Mos. 321; [and see Morgan *v.* Bowdler, Toth. 40. As to examination *de bene esse*, *vide supra*, p. 121, *et seq.*]

(*i*) [Whitelock *v.* Butcher, 13 Ves. 511, where the objections were held to be insufficient.

Depositions to interrogatories will not be suppressed upon the ground that the witness had been furnished with a copy of the interrogatories, previously to his examination, by the party producing him, or because

mistaken in the commission, and the plaintiff's witnesses had been examined under it by the commissioners on both sides: the six-clerk was ordered to amend it; but the plaintiff (whose solicitor had made the error,) was ordered to pay the costs of the motion, and to be at the expense of sealing a new commission for the examination of the defendant's witnesses. (*a*) When a witness was examined inadvertently two days after the
[152] publication had passed, and the other party cross-examined him, the Court would not suppress his evidence. (*b*) And when commissioners abroad took examinations during the abatement of a suit, not knowing that it had abated, they were allowed to stand. (*c*) So where an heir-at-law supposed to be dead was discovered to be living and made a defendant. (*d*) Depositions were not suppressed in consequence of the witness having had a conversation on the subject with one who had been previously examined on the other side. (*e*) When the Christian name of a defendant had been mistaken in the title of the interrogatories, an order was made for correcting the error and re-swearing such witnesses as were willing to be

he has written the answers he could give thereto upon the margin; Kelly *v.* French, Lloyd & G. 166. In Sayer *v.* Wagstaffe, Lord Langdale, M. R., made the following observations:—"It is not a right thing for any solicitor to prepare depositions for a witness before examination. He ought to be examined by the Examiner; and if he goes before him with the depositions ready prepared, it is a reason for suppressing them;" see Shaw *v.* Lindsay, 15 Ves. 380; Att. Gen. *v.* Nethersole, 10 Sim. 311. "It is right for a solicitor to communicate with a witness to know what he can depose;" see Kelly *v.* French, 2 Ll. & Yo. 166. "*That is a thing necessary to be done before the interrogatories are prepared*, nor do I mean to say that it is improper for a solicitor to take down from a witness what he can depose to; or that it is improper for both parties to see a witness to inquire what he can depose to." 5 Beav. 462. As to this, *vide supra*, p. 221, n. (*h*)].

(*a*) Robert *v.* Millechamp, Dick. 22.

(*b*) Hammond *v.* ———, Dick. 50. Cross-examining a witness is said to waive advantage of irregularity; Bland *v.* the Abp. of Armagh, 3 B. P. C. 620; but this must always depend upon circumstances. [See Sutton Corp. *v.* Wilson, 1 Vern. 254; Charitable Corp. *v.* Sutton, 2 Atk. 403.]

(*c*) Sinclair *v.* James, Dick. 277. [Depositions were read although taken during an abatement of the suit, in Thompson *v.* Tooke, Dick. 115. And when a commission to examine witnesses abroad was executed and returned; the defendant not having had his interrogatories prepared, and so not having had an opportunity of cross-examining; a new commission was granted for that purpose; the defendant to state whom he wished and undertook to cross-examine; but the depositions of the witnesses already examined in chief were not suppressed; Campbell *v.* Scougall, 19 Ves. 552.]

(*d*) Austin *v.* Hinton, Dick. 280.

(*e*) [The conversation not having been communicated to his solicitor before the defendant's interrogatories were prepared; but this was without costs, communication between witnesses and parties being disapproved; as to this, however, see Lord Langdale's observations quoted above, p. 221, n. (*i*).] Boughton *v.* Pierrepont, 3 Swanst. 550.

re-sworn. (*a*) When the defendant had declined cross-examining witnesses at the time of their examination before a commission, but afterwards, without any leave of the Court, brought them to London and cross-examined them at the office, their depositions were not suppressed. (*b*) When a witness died before cross-examination, the cross-interrogatories which were about to have been put to him, not going to any point to which he had been examined in chief, nor to his credit, suppression of his deposition was refused. (*c*) The refusal of a witness to be cross-examined is no reason for suppressing his deposition, but the adverse party must, at the time, enforce such right of cross-examination as he has. (*d*) When a witness went abroad the evening after his examination, it was held that the defendant had neglected his opportunity of cross-examining. (*e*) A motion to suppress depositions taken abroad because the [153] Examiners had not given time for cross-interrogatories to be delivered to them, was refused, and a new commission was granted (in this case directed to new commissioners) for the cross-examination, and also for the examination of the defendant's witnesses. (*f*) This is the course which the Court is always anxious to take whenever the witnesses of one party have been

(*a*) Curre *v.* Bowyer, 3 Swanst. 357, and see Lincoln *v.* Wright, 4 Beav. 164; Jones *v.* Smith, 2 Yo. & C. 42, [*ut supra*, p. 221, n. (*a*).]

(*b*) Pearson *v.* Rowland, 2 Swanst. 266.

(*c*) O'Callaghan *v.* Murphy, 2 Sch. & Lef. 158, [and see Arundel *v.* Arundel, 1 Ch. Rep. 90. In the Chancery of Ireland, a witness dying, after his examination in chief, and before he was cross-examined; his depositions may be read *valeant quantum:* but if his death had happened before his examination in chief was completely finished, no use could be made of his testimony; Nolan *v.* Shannon, 1 Moll. 157.] Lord Parker allowed the death of a witness to waive, as it were irregularity; Debrox *v.* ——, 1 P. Wms. 415.

(*d*) Courtenay *v.* Hoskins, 2 Russ. 253. [As to cross-examination, *vide supra*, p. 70-1.]

(*e*) Cazenove *v.* Vaughan, 1 M. & S. 8. In the Exchequer, when a witness was brought from the country to be examined before a Baron, the party bringing him had to keep him in town one day after the notice given, in order to let the adverse party have an opportunity of cross-examining him; 2 Fowl. Exch. Pr. 134. [In the Exchequer also, on motion to suppress depositions of plaintiff's witnesses, he not producing them to be cross-examined, a new commission was ordered; defendant to have the carriage of it, the depositions of such witnesses, already examined for the plaintiff, as he should produce for cross-examination to stand, the others to be suppressed; Charlton *v.* Robson, 2 Fowl. 158. On a similar motion *ex parte*, the Court ordered the witnesses to be produced, plaintiff to give a note of what witnesses they had examined, and defendant to give a note of those they wished produced, to be cross-examined; Spalding *v.* Bragham, 2 Fowl. 158, S. P., Johnston *v.* Carruthers, ibid. 159; and see Whittuck *v.* Lysaught, 1 S. & S. 446, *ante*, p. 54.]

(*f*) Campbell *v.* Scougal, 19 Ves. 556.

examined *bonâ fide* and a reasonable account is given why the cross-examination and the examination of the adverse witness did not take place (*a*); a party will even be pressed to consent to it when the deposition ought in strictness to be suppressed. (*b*)

Order of 1618-19, Bacon, C.

[By an Order of 29th January, 1618-19, Bacon, C., No. 82, "No commission for the examination of witnesses shall be discharged, nor no examination or depositions shall be suppressed, upon petition, except it be upon point of course, of the Court first referred to the clerks, and certificate thereupon. (*c*)]

Order for reference to the six-clerks.

By an Order of 22nd May, 1661, Clarendon, C. "No motion shall be made in Court or by petition for suppressing depositions as having been irregularly taken, until the six-clerks not in the cause have been first attended with the complaint of the party grieved, and shall certify the true state of the fact to the Court with their opinion, (if the solicitor and clerks shall not for the sake of their clients, agree before them,) for which purpose a rule for attending the six-clerks shall be entered of course with the registrar at the desire of the party complaining, which shall warrant their proceedings and certificate to the Court." (*d*)

Now to the Master.

This reference is now to the Master, not to the six-clerks. (*e*)

The process of suppression.

When the prayer of the motion is granted, the clerk in Court (*f*) endorses the examination "suppressed," and it remains unopened; but the objections above mentioned do not all of them go the length of preventing the Courts directing afterwards that the depositions may be opened, if the witness could not be examined again, or if necessity in any way require that the

[154]

rule should be dispensed with. (*g*) Something equivalent to this was done in a case where the defendant having examined a witness after publication, and having, (on discovering his

(*a*) Campbell *v.* Scougall, 19 Ves. 556.

(*b*) Cholmondeley *v.* Clinton, 2 Mer. 81; [and see Irving *v.* Viana, 1 Yo. & J. 416, fully cited *supra*, p. 120, n. (*c*).]

(*c*) [Sand. Ord. 119-20; and see Orders of 1649, ibid. 230 and 243.]

(*d*) [Sand. Ord. 304, the earlier Orders, ibid. 243, 230, 129, and 119.]

(*e*) Bea. Ord. 194; and see the note. [See also Dan. Ch. Pr. by H., 939.]

(*f*) [Now by an Order of 26th Oct. 1842, No. 3, the clerk of records and writs; Sand. Ord. 916-17.]

(*g*) Shaw *v.* Lindsey, 15 Ves. 384.

irregularity,) obtained an order to re-examine him, the witness died; Lord Parker, C., ordered that the defendant might make use of the depositions sworn by this witness, the re-examination of him having been prevented by the act of God. (*a*)

[155]

Every ground upon which a motion can be made for suppressing depositions, except perhaps scandal, may be also raised when the evidence is offered at the hearing. Thereupon the reasons for the objection are discussed and the question of admissibility forthwith decided; or the discussion or decision may, if the Court so direct, be postponed until it has been seen, from the further progress of the suit, whether this particular evidence is material; that is, whether it will eventually bear upon the final judgment.

Objections at hearing of the cause.

It will be of advantage here to divide the grounds of objection into those which are peculiar to Courts of Equity, and those which are equally valid in Courts of Common Law [; and accordingly we shall treat of them separately; in the next two chapters of this work.]

(*a*) Copeland *v.* Stanton, 1 Ves. 415. [As to waiver of right: where defendant cross-examines the plaintiff's witnesses, he cannot afterwards move to suppress their depositions in chief; Bland *v.* Armagh, Abp. of, 3 Bro. P. C. 620. After suppression of depositions of a witness who had been examined before the decree, and, without an order, after the decree, the usual order was made, for his re-examination on interrogatories, to be settled by the Master, to matters to which he had not been examined; Smith *v.* Graham, 2 Swanst. 264. When after depositions have been suppressed for irregularity a re-examination is permitted, all the same witnesses must be examined and cross-examined; Perry *v.* Silvester, 1 Jac. 83.]

CHAPTER II.

OBJECTIONS AT THE HEARING.

First, On grounds peculiar to Courts of Equity.

ANY of the grounds of irregularity, in the commission or in the process of examination, which have been detailed in the preceding section, are equally available at the hearing; but as their effect in almost every instance is merely delay, they seldom come with propriety, at so late a stage of the suit. In fact they are often waived, from an anxiety to avoid even the appearance of captiousness. But there are many circumstances, (surprise, for instance,) which may justify mere delay: and many, (such as the death of a witness,) which may render the evidence, if once lost, irreparable. Various flaws lie concealed until accident, perhaps arising at the hearing, discovers them; and some
[156] are not in fact defects until the depositions are actually offered in evidence, because up to that moment they might easily be remedied. Of the former kind might be, that the party's solicitor in the country had acted as a commissioner; of the latter, that the signature of the examiner or six-clerk was wanting to the office-copy produced, (*a*) or, (until that duty was repealed), that the depositions had not been properly stamped. In such cases the Court is generally ready to let the cause stand over, or to hear it on an understanding that the fault shall be remedied afterwards.

(*a*) C. B. Gilbert speaks of the practice with regard to this, in his time; "The depositions are not admitted to be read at the hearing, if either of the six-clerks, who constantly attend the Court every day of hearing, stands up and says, 'the books are not signed.'" For. Rom. 150.

Oath of one witness only against an assertion in the answer,

It has been already mentioned, as a rule of Equity, that the oath of a single witness shall not prevail against a distinct and positive assertion in the answer. (*a*) When, therefore, such an assertion is pointed out by the defendant's counsel, the testimony is simply treated as insufficient. It is not however suppressed, for "though the rule of the Court is, where there is oath against oath, that the plaintiff shall not have a decree for relief upon this fact, yet this Court, as well as Courts of Law, will so far lay stress upon the evidence as it serves to explain any collateral circumstance." (*b*) And the circumstances thus explained may re-act so as to give efficacy to the evidence, by reason of the further rule that single testimony will prevail if corroborated by circumstances. (*c*)

insufficient;

except to explain.

Issue thereupon granted.

When single evidence thus aided is admitted, the Court is often willing to grant the defendant an issue; (*d*) and it will generally order that the answer be read in evidence before the jury, (*e*) or that the defendant himself be examined. He then labours under the disadvantage that whereas a Court of Equity gives the same weight to the answer that it does to the evidence of the witness, the jury will look upon him with all the suspicion which attaches to an interested person; (*f*) and Lord Eldon, after mentioning this, stated the principle to be that "the Court being willing to give judgment upon the question whether the circumstances outweigh the effect of the rule, so as to authorize a decree against the defendant, will allow the defendant to ask

[157]

(*a*) *Supra*, pp. 4 and 5.

(*b*) Anon. 3 Atk. 270.

(*c*) *Vide supra*, p. 4, and the cases cited there.

(*d*) Only *v.* Walker, 3 Atk. 408; Speed *v.* Martin, (Exch.) 2 Com. 588; Pember *v.* Mathers, 1 B. C. C. 52, reported also in Dick. 550, as Pemby *v.* Mathew; Ibbetson *v.* Rhodes, 2 Vern. 554; Cant *v.* Beauclerk, cited in 3 Atk. 408. In the two last cases, there do not appear to have been any corroborative circumstances, but upon the whole the rule is almost decisive, that where the evidence stands quite alone, the Court will not send the question to a trial at law.

(*e*) Ibbetson *v.* Rhodes, 2 Vern. 554; Cant *v.* Beauclerk, cited in 3 Atk. 408; Glyn *v.* Bank of England, 2 Ves. 42.

(*f*) [*Vide supra*, p. 5, n. (*b*). The Court refused to order the defendant, to a mere bill of discovery in aid of an action at law, to produce, at the trial or other proceedings incident thereto, documents, &c. admitted by his answer to be in his possession; as it would deprive him of the benefit of having his answers read at the trial; Brown *v.* Thornton, 1 Myl. & K. 243. Where an answer in Chancery of the defendant is read at Nisi Prius, he is entitled to have the whole bill read as part of his opponent's case; Pennell *v.* Meyer, 2 M. & Rob. 99. As to directing an issue, *vide infra*.]

that he shall at his peril withdraw it from this Court, and run the risk of an inquiry less favourable in its principle, by praying an issue."(*a*) In a later case Lord Eldon doubted whether the practice was quite wholesome, and said that great delicacy had always prevailed in allowing the plaintiff to read the defendant's answer in evidence, not as believing and relying upon it, but in order to produce other evidence to contrast with it and arguments to impeach it. (*b*)

Other objections.

There are other objections, depending on certain rules of [Courts of] Equity, which have been, or will be, discussed in other parts of this work; for instance, to evidence adduced in support of a will, that all the three witnesses have not been examined; (*c*) to an office copy, that the original is not to be found among the records of the Court; (*d*) and various others.

(*a*) E. I. Co. *v.* Donald, 9 Ves. 284.
(*b*) Savage *v.* Brocksopp, 18 Ves. 337.
(*c*) *Vide supra*, p. 180.
(*d*) *Vide supra*, p. 165.

CHAPTER III. [158]

OBJECTIONS AT THE HEARING.

Secondly, On grounds common to Equity and Common Law.

SECTION I.

EVIDENCE IMPERTINENT.

Definition.

WHEN evidence is said to be impertinent or irrelevant, (which are almost synonymous terms,) it is not intended to be understood that it does not bear upon the broad question of justice between the parties, or upon the matter in dispute, nor even that it does not support the case set forth in the pleadings, but that it does not apply to the material points which have been put in issue and which the Court is prepared to decide. (*a*)

Kinds of impertinence.

Thus, Impertinence may be divided into several heads; (*b*) First, when the evidence relates to matters not in the pleadings; Secondly, when it relates to matters that are admitted in the pleadings, and which are consequently not in issue; Thirdly, when it relates to matters which, although in issue, are immaterial, and therefore do not call for the decision of the Court. And to these ought perhaps be added; Fourthly, when it is needlessly prolix. (*c*)

(*a*) [Thus evidence of conversations and admissions is not admissible, unless the attention of the opposite party has been called to them, in the pleadings; Langley *v.* Fisher, 9 Jur. 1066.] "Impertinence, generally considered, is that which is immaterial, and generally considered, what is material is not impertinent." Alexander, C. B., in Bally *v.* Williams, 1 M'Cl. & Y. 337.

(*b*) [As to scandal and other kinds of impertinence, *vide supra*, p. 214, *et seq.*]

(*c*) [As to prolixity in "pleadings, petitions, or affidavits, which have not been referred for impertinence," see the *new* Order of May, 1845, No. 122; Sand. Ord. 1019. But *semble*, prolixity short of impertinence, either in interrogatories or depositions, is not provided for.]

[159] The reason for excluding those of the first kind is obvious; the main object of allowing pleadings at all is that the disputed points may be brought to issue clearly and definitely; and this object would be entirely frustrated if, after the pleadings were closed, the questions were permitted to be unexpectedly altered. It has been mentioned above that Lord Eldon refused a motion to refer interrogatories and depositions to the Master on the ground of impertinence alone, when there was no suggestion of their containing scandal; his reason being the risk of expunging matter that might eventually prove to be material. (*a*) But at the same time he gave liberty to make any motion on the subject at the hearing; for then, he said, the Court would be able to judge of impertinence, because it would understand the whole cause from begining to end. (*b*)

I. Matters not in the pleadings.

When the impertinent matter runs to so great a length as to make it a matter of importance with regard to costs, an application would properly be made, at the hearing, to expunge it, or to suppress the depositions. (*c*) But generally speaking it is more a question between the party and the Court itself, whether the time shall be so unprofitably taken up. Still as the adverse counsel cannot always depend upon keeping the mind of the Court steadfastly fixed on the real issue between the parties, he ought to know when he may exert his discretionary power of stopping the reading of what is irrelevant. It will therefore be useful for us to examine the cases in which this has occurred.

Cases.

The law on the point in question remained long unsettled. In the old cases the principle of the Court seems to have been to sift the real merits in whatever way they could be discovered, though against the strong remonstrances of counsel; who urged, that the proof of matters not in issue was idle, that the

(*a*) *Vide supra*, p. 218. [Documentary evidence may be read at the hearing, although not put in issue by the pleadings; Malcolm *v.* Scott, 3 Hare, 39, *ut infra*. A party may prove his case by parol or by written evidence, and is under no restriction in respect of one, more than the other: evidence of substantive extrinsic facts therefore, whether parol or documentary, need not be put in issue; but evidence of admissions of conclusions of law must be put in issue, and that equally whether such admissions be in writing or otherwise; Fitzgerald *v.* Flaherty, 1 Moll. 350.]

(*b*) Osmund *v.* Tindall, Jac. 628.

(*c*) [But see last page, n. (*c*).]

witnesses could not be indicted for perjury; and, in the case of a deed produced at the hearing, that the adverse party, being taken by surprise at its contents, had had no opportunity of cross-examining or of procuring counter evidence. (*a*) But in [160] a case where the bill was to annul a bond for want of consideration, a *turpis contractus* was not allowed to be proved. (*b*) Where the bill was filed by a devisee against the heir-at-law, an objection, proved by the depositions but omitted in the answer, that the plaintiff was an alien papist, was not listened to. (*c*) And where the answer had set up as a defence against a specific performance that there were puffers at a sale, proof of the additional fact that the auctioneer denied the presence of puffers, was disallowed. (*d*) So at common law when the breach of a covenant had been assigned thus, "that the defendant had not used a farm in a husbandlike manner, but on the contrary had committed waste," the plaintiff could not give evidence of the defendant's using the farm in an unhusbandlike manner if it did not amount to waste. (*e*) Where a bill had been filed to set aside a sale, on the ground of fraud practiced by the defendant upon the plaintiff; the fact of the former having stood in the relation of attorney to the latter at the time of the sale, whence it might be inferred that he acted fraudulently, by taking advantage of that character, having been omitted in the bill, could not be put in evidence. (*f*) Where a bill had set forth letters as constituting a contract, evidence *aliunde*, supplying terms to the contract was inadmissible. (*g*) An answer disputing a contract could not

(*a*) Bevan *v.* Dyke, 2 Ch. Ca. 3; Balch *v.* Tucker, ibid. 40; Strode *v.* Strode, ibid. 196; Hodgson *v.* Thornton, 1 Eq. Ca. Abr. 228; and see Colman *v.* Sarrell, 1 Ves. 51. [Letters proved although not stated in the pleadings not therefore inadmissible; (*ut vide* Fitzgerald *v.* Flaherty, 1 Moll. 350;) but where the opposite party might be taken by surprise, the Court would give an opportunity of controverting them; Malcolm *v.* Scott, 3 Hare, 39.]

(*b*) Whaley *v.* Norton, 1 Vern. 484.

(*c*) Clarke *v.* Turton, 11 Ves. 240. In Finkin *v.* Hill, 4 B. P. C. 640, a somewhat similar case, as an issue ought not to have been granted, it follows that depositions ought not to have been received, on the point foreign to the pleadings.

(*d*) Smith *v.* Clarke, 12 Ves. 477.

(*e*) Harris *v.* Mantle, 3 T. R. 307.

(*f*) Williams *v.* Llewellyn, 2 Y. & J. 68.

(*g*) Birce *v.* Bletchley, 6 Mad. 17. [As to extrinsic evidence, see next sect.]

be supported by proof of its performance. (*a*) Where the answer disputed the construction of a deed, the Court refused to hear
[161] evidence that its execution had been procured by fraud. (*b*) And where the answer had pleaded a modus and the defence had failed, an issue to try whether there was a composition real was refused, although the defendant could almost prove it from
Rule. the plaintiff's own evidence. (*c*) In short of late years the rule has been considered as fully established, (*d*) that the Court cannot notice matter, however clearly proved, of which there is no allegation in the pleadings. (*e*)

Yet there seems to be an exception in an interpleading suit, for there, on evidence being offered to prove that the plaintiff was acting under an indemnity from some of the defendants, Commissioners sitting for the Master of the Rolls held that it tended so much to show the complexion of the bill that it must be admitted as forming a material feature in the case. (*f*)

The above are instances of attempts to introduce totally distinct facts from those relied upon in the bill or answer. (*g*)

(*a*) Ward *v.* Buckingham Duke of, 3 B. P. C. 581.

(*b*) Blake *v.* Marvell, 3 B. & B. 47; but this and some other cases which might be mentioned fall also under the principle that a defendant is bound by his own admissions. [Except he be an infant, as in Holden *v.* Hearne, 1 Beav. 445.]

(*c*) Bennett *v.* Neale, 1 Wightw. 354.

(*d*) Gordon *v.* Gordon, 3 Swanst. 472; Walpole L. *v.* Orford L., 3 Ves. 402. See the observations of C. B. Richards, in Hall *v.* Maltby, 6 Pri. 259. [And see Stanley *v.* Robinson, 1 R. & M. 527.]

(*e*) [Even on behalf of an infant; Powers *v.* Mansfield, 6 Sim. 565, and Holden *v.* Hearne, 1 Beav. 445. Where upon an issue at law as to injury from the smoke, &c. from the defendant's works, the plaintiffs produced evidence as to the effect upon other adjoining grounds, and the defendant having called a witness, to show the state of other adjoining gardens, the witness was asked if he did not know that compensation had been made by the defendant to those proprietors, for alleged damage; it was held inadmissible, as raising a collateral inquiry, and not tending, by answer either way, to affect the issue, or test the witness's credit, overruling the judgment below; Tenant *v.* Hamilton, 7 Cl. & Fin. 122.] The rules respecting Variance, which occupy so large a space in other treatises, might follow here, for they depend upon the principle that a different thing has been proved from that which was pleaded; but in consequence of the facility with which amendments are allowed, the objection, fatal at common law, is merely dilatory in equity, and counsel rarely venture to incur the prejudice of so vexatious a proceeding.

(*f*) Strathan *v.* Hull, T. & R. 30.

(*g*) [A gift by husband to wife, either as a *donatio mortis causâ* or as a *donatio inter vivos*, to her separate use, must be established by evidence beyond suspicion. A defendant by her answer having claimed a gift from her husband as an absolute *donatio inter vivos* to her separate use, whether evidence be received to establish it as a *donatio mortis causâ*. *Quære?* Walter *v.* Hodge, 2 Swanst. 92, S. C. 1 Wils. 445.]

But it often happens that circumstances not specifically stated in the pleadings may be supported under general allegations. (*a*) If, for example, it is alleged that a man is insane, or addicted to drinking and liable to be imposed upon, not only his general character for madness or drunkenness, but particular instances may be proved. (*b*) So on a charge that the defendant was a lewd woman of an infamous character, proof of particular acts is allowed. (*c*) But a defence by a husband against a bill praying for a separate maintenance on the score of ill usage, that the wife had misbehaved herself, or that she had not behaved with the duty and affection that became a virtuous woman, would not let in proofs of adultery (*d*); the nature of the wife's misconduct must be sufficiently alluded to. (*e*) A bill by an executor alleged that certain bonds had been obtained by threats and undue means; the answer asserted that they were for real debts; and it was held that the answer let in proof of a *turpis contractus*. (*f*) With respect to honesty and integrity it is not unfrequent for a question to arise whether the general character or conduct is

Under general allegations,

e. g. of insanity, inebriety, infamy,

particular instances may be proved;

[162]

but must be sufficiently alluded to.

Character in general.

(*a*) [Under a general charge of notice evidence of particular facts and conversations may be given; Hughes *v.* Garner, 2 Yo. & Col. 328. But for obvious reasons where a general exemption from tithes is insisted upon, evidence of a partial one is not admissible; Leigh *v.* Maudsley, Bunb. 196. On the subject of specific facts being proveable upon general allegations in the Ecclesiastical Courts, see Evans *v.* Evans, 1 Hagg. C. R. 96, and in note, and pp. 97 and 101; Sheafe *v.* Rowe, 2 Lee's R. 415, cited below.]

(*b*) Lord Hardwicke in Clark *v.* Periam, [cited below], 2 Atk. 340; as in an indictment for keeping a common brothel, ibid.; Carew *v.* Johnstone, 2 Sch. & Lef. 280. [As to unsoundness of mind and general madness being proved, the necessity of the other party proving lucid intervals, and by what evidence; see Halls *v.* Warren, 9 Ves. 611; White *v.* Wilson, 13 Ves. 88. In the Ecclesiastical Courts, that it was the ancient practice, in cases of insanity, that the witnesses should speak to particular acts, under the general plea, and that it is very desirable to revert to this practice; see noticed in Sheafe *v.* Rowe, 2 Lee's R. 415. In the Ecclesiastical Courts, the mere opinion of the witness as to capacity is of little weight with the Court; *per* Sir John Nicholl, in Evans *v.* Knight, 1 Add. R. 244, and see Kinleside *v.* Harrison, 2 Phill. R. 449. But even the mere opinions only of professional men of eminence can by no means be passed over with similar inattention; *per* Sir John Nicholl, in Evans *v.* Knight, 1 Add. R. 244. As to the evidence of medical men, as to sanity, see Kemble *v.* Church, 3 Hagg. 273. And as to impotency, in the Ecclesiastical Courts, see Norton *v.* Seton, 3 Phill. R. 14.]

(*c*) [But pointed and applied to the general charge,] Clarke *v.* Periam, 2 Atk. 337; [S. C. 9 Mod. 340; and cases there cited.]

(*d*) Sydney *v.* Sydney, 3 P. Wms. 269; Donerail *v.* Donerail, cited 2 Atk. 338; Roberts *v.* Maiston, cited in Bull. N. P. 296.

(*e*) Watkyns *v.* Watkyns, 2 Atk. 96.

(*f*) Matthew *v.* Hanbury, 2 Vern. 187.

Forfeiture of right to relief.

put in issue. (*a*) It often is so when it is contended that the plaintiff has forfeited his right to relief. This defence having been set up to a bill for the performance of an agreement to continue the plaintiff in an office, and charges having been made in the answer that he had received divers fees improperly and not accounted for others, and concealed several instruments and writings belonging to the office, Lord Talbot, reversing the judgment at the Rolls, held that particular instances of this general misbehaviour might be proved. (*b*) In criminal prosecutions the prisoner is always allowed the benefit of witnesses to his character, but in a civil suit such evidence is considered irrelevant. (*c*) Thus in an ejectment by an heir-at-law, to set aside a will for fraud and imposition committed by the defendant, the party accused was not permitted to call witnesses to prove his general good character. (*d*) Evidence to general bad character must in almost every instance be scandalous. (*e*)

[163]

As the principle upon which impertinent evidence is disallowed is the same that regulates the decree, with regard to which it is the general rule that it cannot be founded on any matter that does not appear in the pleadings, the cases on that subject are well worthy of attention, (*f*) and the more so because they contain certain arbitrary rules which must have the effect of limiting the relevancy of evidence. For instance, an executor is never decreed to account for monies which he might but for his own wilful negligence and default have received, unless a case of wilful negligence and default is alleged in the bill. Consequently where such a charge is omitted, evidence to the point would be impertinent matter. The cases also which relate to the putting of matters in issue in the pleadings are intimately connected with this subject. (*g*)

(*a*) See Bull. N. P 295.

(*b*) Wheeler *v.* Trotter, Sir Clement Wearg's. MSS., quoted in 3 Swanst. 177.

(*c*) Att. Gen. *v.* Bowman, 2 B. & P. 532, note.

(*d*) Faro *v.* Hicks, Bull. N. P. 296. [Every *primâ facie* presumption of fraud or undue influence may be rebutted, by positive proofs of fair dealing, showing that the party was under no influence unduly exercised; Moore *v.* M'Kay, 1 Beat. 294.]

(*e*) As to bringing evidence to impeach the testimony of the adverse witnesses, *vide supra*, p. 204, *et seq.*

(*f*) See them collected in Mitf. on Pl. 39; Chitty's Eq. Ind. 772.

(*g*) Chitty's Eq. Ind. 767, 769; [Ib. 2nd ed. 1375, *et seq.*]

Depositions however which are irrelevant as direct evidence may sometimes be put in and used in proof of collateral facts, particularly when they are matter of inducement, (as it is technically called), leading to evidence that is clearly material. Thus in a bill to impeach an award, testimony relating to the merits is inadmissible except for the purpose of throwing light upon the conduct of the arbitrators. (*a*) The rule of confining the evidence closely to the points in issue, is far more strict in the trial of criminals than in civil cases; yet even in the former, proof of other acts may be adduced to show a criminal knowledge or intention; (*b*) but it still remains in the discretion of the Judge whether he will admit such proof. (*c*)

Collateral facts.

For the purpose of establishing a general principle or state of things under which the facts in issue fall, other facts which also fall under it may be produced in evidence. As in the case at common law respecting the right to timber in a certain portion of a belt which surrounded a manor, the plaintiff was allowed to prove that he had felled trees in other parts of the same belt. (*d*) So also acts exercised in assertion of right upon one part of a waste, are receivable in evidence against occupiers of other parts of the same waste. (*e*) But the connecting link is absolutely necessary; similarity alone is insufficient. For instance, the customs of one manor cannot be adduced to prove the customs in another; (*f*) unless it be shown that the one manor was anciently a part of the other: (*g*) or that they both lie in one district the character of which accounts for the custom (*h*); or, if the question relates to the tenure, that they belong to a district of manors all held by the same tenure: (*i*) or unless some other such connection be proved. Proof that

General principles:

e. g. Rights;

[164]

Customs;

(*a*) Goodman *v.* Sayers, 2 J. & W. 259. And see Hunter *v.* Gibson, 2 H. Bl. 288.

(*b*) See 1 Phil. on Ev. 166, and the following pages.

(*c*) R. *v.* Ellis, 6 B. & C. 145.

(*d*) Stanley *v.* White, 14 East, 332.

(*e*) Child *v.* Winwood, 1 Taunt. 208.

(*f*) Roe *v.* Parker, 5 T. R. 30; Foster *v.* Sisson, 12 East, 65; Noble *v.* Kennaway, 2 Dougl. 513; *per* Lord Hardwicke, in Dean and Chapter of Ely *v.* Warren, 2 Atk. 189.

(*g*) Moulin *v.* Dallison, Cro. Car. 484.

(*h*) As a mine district, a fen district, &c. Dean and Chapter of Ely *v.* Warren, 2 Atk. 189.

(*i*) Champion *v.* Atkinson, 3 Keb. 90; Somerset Duke of *v.* France, 1 Str. 659, where the question is discussed at length. Lowther *v.* Raw, 2 B. P. C. 451.

half of a river belonged to each manor on its bank in various parts of its course was admitted to show that such was the general custom of the vallies through which it ran. (*a*) The manorial customs in the north of England are considered as Border Laws and evidence of the law of the country. (*b*) Parochial customs stand very much in the same situation with manorial; proof of the customs in other parishes is not evidence to effect the parish in question, unless the custom is laid as the general custom of the country. (*c*) So in a question respecting a payment from a farm in lieu of tithes, evidence of similar payments from neighbouring farms could not have been adduced, by the defendant, to prove that it was a modus, but might be adduced, by the plaintiff, to prove that it was merely a part of a composition extending over the township. (*d*) Where acts of ownership, such as cutting trees, or digging minerals, in one spot, have been held admissible, in order to show a right in another: a reasonable probability has been previously made out, that the whole land had been formerly in one owner, and had been all subject to one and the same burden. (*e*)

Local laws; Parochial customs; Tithes; Local rights. [165]

II. Matters admitted in the pleadings.

The *second* species of impertinence, namely, when witnesses are examined to prove or disprove facts which have been admitted in the pleadings, depends upon reasons as obvious as the former.

On the one hand, for the parties to disprove facts which they have themselves admitted would be a mere mockery. The plaintiff would be repudiating the statements which he had laid down as the basis of his demand for justice; the defendant would be convicting himself either of perjury or unpardonable

(*a*) R. *v.* Ellis, 1 M. & S. 662.
(*b*) Ruding *v.* Newell, 2 Str. 957.
(*c*) Lord Mansfield in Furneaux *v.* Hutchins, Cowp. 808.
(*d*) Blundell *v.* Howard, 1 M. & S. 292.
(*e*) Tyrwhitt *v.* Wynne, 2 B. & A. 554; Hollis *v.* Goldfinch, 1 B. & C. 218. [As to tithes; usage is evidence of an exemption, and a later usage of one antecedent, since no other can be had; York Archbishop, *v.* Stapleton, 2 Atk. 137. Under certain circumstances an old map was refused in Newcome *v.* Matthew, 5 Sim. 243; and of such, *vide supra*, p. 146, n. (*a*), *et* p. 186. The liability to repair a sea-wall *rationi tenuræ* may not be limited to such as are sufficient to resist ordinary tides and weather; and the orders of commissioners, made long back, are admissible evidence of the extent of the liability, who are bound by precedent, prescription, customs, and tenures; Reg. *v.* Leigh and others, 2 Perr. & D. 357.]

negligence. An admission acts therefore as an estoppel on the party who has made it. (*a*) The adversary however may waive his privilege of having the evidence suppressed, and may use it in support of his own case. He may also use it for the purpose of impugning the case set up against him; for "although the defendant fails in his defence, yet if the plaintiff himself show that he is not entitled to the thing he seeks to recover, he shall not recover." (*b*)

Admission an estoppel.

On the other hand, the statements in the bill and the admissions in the answer, being so strictly conclusive as to prevent the party who made them from disputing their truth, it would be worse than useless to allow his adversary to file superfluous examinations; [in support of them,] causing delay to the business of the Court and increasing the expenses of the suit.

The admission must however be full and unequivocal. Lord Thurlow said, "If a defendant had charged himself by his answer to the full amount sought by the bill, or if the suit was closed as to any particular fact by a plenary admission of the defendant, and after this the plaintiff thought proper to examine witnesses to the point so admitted, the depositions as to this point, I think, would be foreign and inpertinent; and in that case I should send it to the Master to inquire whether the witnesses had been examined on any point not in issue in the cause." (*c*) The extent of the admission would of course in such a case be measured by the Court very accurately. The common form in an answer, that a testator duly made the will set forth in the bill, with a reservation of the right to refer to it for greater certainty, would make only the proof of the execution superfluous. Many of the other rules in the preceding, and in the following chapters, respecting admissions, might require to be considered with reference to the point before us. (*d*)

Admission to enure as such must be full.

[166]

It may be a question how far the plaintiff is bound to accept a plenary admission in the answer and to abstain from examining

Joined with adverse facts.

(*a*) [*Vides supra*, p. 11, n. (*d*).]
(*b*) Wood, B., in Bennett *v.* Neale, Wightw. 354.
(*c*) Vaughan *v.* Lloyd, 1 Cox, 314.
(*d*) [As to admission, in the pleadings, *vide supra*, p. 9, *et seq.*]

witnesses, when that admission is inseparably joined with a fact which militates against him. It must depend upon the importance of that fact in the opinion of the Court. Cases like this will always be governed by their own circumstances. They are of too rare occurrence to have rules laid down for them, or to be thought worth the notice of the reporters.

It has been mentioned that the Court will not notice matters which are admitted, or, more correctly speaking, stated, in the answer, if they are not founded on allegations in the bill. (*a*) It follows necessarily that evidence adduced by the plaintiff in support of a case so standing on the pleadings, would be objectionable on the score of impertinence.

Admissions by agreement.

Admissions by consent preclude all further evidence as effectually as admissions in the pleadings. (*b*)

Party may examine many witnesses to prove the same fact.

But however clearly one witness may have proved a fact it is no obstacle to the examination of an indefinite number of other witnesses to the same point. In a case in which this had been done to an unwarrantable extent, Lord Thurlow said that he could not invent a principle on which this over anxiety to prove facts could be treated as impertinence. (*c*)

[167]

III. Matters not material.

The *third* species of impertinence has been defined to be when matters are proved which, although in issue, are immaterial, and therefore do not call for the decision of the Court.

What is really in issue.

Every statement in the bill which is not admitted by the answer, and every statement in the answer which is contradicted by the replication, (*d*) may be said to be in issue. But it does not follow that matters *thus* in issue either *must* or *may* be proved. In the first place, a party may abandon as much as he pleases of his original statement. In the second place, with respect to those allegations which he intends to support, he is not permitted to enter into evidence on any points that are unnecessary; and thus his discretion may be said to be bounded by the line up to which his case absolutely requires him to

(*a*) *Vide supra*, p. 26-7.

(*b*) [Of such, *vide supra*, p. 47, *et seq.*]

(*c*) Vaughan *v.* Lloyd, 1 Cox, 314. [And even if considered as a kind of impertinence only, viz. prolixity, *semble*, that the Order of May, 1845, No. 122, Sand. Ord. 1019, does not afford an effectual remedy.]

(*d*) [The present mode of Joining Issue, and the form of Replication, see by Order of May, 1845, No. 93, Sand. Ord. 1010-11.]

proceed. (*a*) Lord Clarendon's order is very peremptory; "When the defendants have answered, the plaintiffs and their counsel are seriously to advise of the answers; [and if they find that upon the answer alone, without further proof, there be sufficient ground for a final order or decree, to proceed upon the answer, without further lengthening of the cause, or] if it be needful to prove one or a few particular points, to reply unto these points, (*b*) and not to draw into pleadings or proofs any more than those necessary points, thereby making long books and putting both sides to unnecessary charges; the defaulters herein to be punished by paying the charges of the copies, or otherwise as cause [the case, *qu.*] shall require." (*c*) It is not to be supposed that this line is in practice very closely adhered to; some latitude will always be allowed for abundant caution; but it is incumbent upon us to trace it as minutely as we can, and the better form of such inquiry will be to ascertain what is, generally speaking, *necessary* to be proved.

Old Order, Clarendon, C. Hearing on Bill and Answer.

[At Law] it is a general rule that the substance only of the issue need be proved. This proposition seems perfectly plain when applied to criminal matters; for robbery is the same crime whether a hundred pounds, or five shillings have been taken. In Equity it is equally true. Wherever the suit is for reparation of an injury, the decree is granted on proof of injury however slight, and the extent is a matter for subsequent inquiry; just as [at Law] in an action of waste for cutting down a certain number of trees, proof of a smaller number will carry the verdict, (*d*) or in an action for slander, it is sufficient if some of the actionable expressions in the declaration are proved, (*e*) [so in Equity on proof, or admission by the other side, of the mere facts necessary

Substance to be proved.

[168]

(*a*) As noticed in the text, what mass of evidence he may choose to bring to bear upon each individual point, is quite discretionary. The sufficiency or insufficiency for the proof of particular points when the evidence is scanty, is again a distinct topic; for which *vide infra*, Pt. III. ch. 3. [In Equity that is proof which the Court will act upon, perfectly irrespective of whether it amounts to physical or moral demonstration; but, on many accounts, a party may be justified in entering into a mass of evidence which eventually turns out to have been quite unnecessary.]

(*b*) See Mitf. on Pl., p. 322. The special replications are now out of use. [And see last page, n. (*d*).]

(*c*) Bea. Ord. 180. [Sand. Ord. 299, 300. And see the next order, as to hearing on bill and answer; Ibid. 300.]

(*d*) Co. Litt. 282 *a*.

(*e*) Campagnon *v.* Martin, 2 Bl. Rep. 790.

to give a title to an inquiry, such is granted, although it may be a fruitless one. (*a*)]

Inquiries.

One reason why this principle is not so self-evident in an equity suit as in a criminal trial is that in many cases the original decree is obtained almost as a matter of course; while the inquiries to be taken afterwards, constituting perhaps a minute investigation into the conduct and liabilities of various parties, assume an importance far greater in appearance than the decree itself. Some of these inquiries the Court will not allow the parties to enter into except before the Master. (*b*) This question, as applied to the taking of accounts, was argued three times in quick succession before Lord Gifford. The last of the judgments was as follows: "I made diligent inquiry into the subject before I decided *Law* v. *Hunter*; and the result of my inquiry was that I did not find any instance in which it had been held that such evidence as was tendered there, and is now tendered in the present case, could be received in this stage of the proceedings. Since the account cannot be taken at the hearing, of what use can it be to give evidence of the items of that account, when the Court cannot examine whether those items should or should not be allowed. The only question at the original hearing is whether the defendant is an accounting party. If the course contended for by the defendant be according to the practice of the Court, it is not easy to say where the consequences will stop: for every suit for an account against a trustee or an executor will be loaded, from the very outset, with an immense mass of evidence relating to the particulars of an account into the consideration of which the Judge cannot enter at the hearing." (*c*) It should always be remembered that the object of the evidence before the hearing is to secure the decree, and therefore, in the case which it establishes, that aim must be kept primarily in view.

Reference to the Master.

An account not taken at hearing;

but the only question then is whether defendant is to account.

[169]

(*a*) [As in Thornton *v.* Knight, *vide supra*, p. 179, n. (*e*).]

(*b*) [As to the inquiries directed in certain suits before the hearing, called therefore preliminary inquiries, see the Orders of 9th May, 1839; Sand. Ord. 852, *et infra*, ch. v, s. 2. Reference to Master.]

(*c*) Walker *v.* Woodward, 1 Russ. 107; [and so it was in the Court of Exchequer, see Knebell *v.* White, 2 Yo. & C. 15.]

Unessential matters not to be proved.

Circumstances which are not essential to the transaction, or in colloquial parlance, things which do not signify, need not, and ought not, to be proved. If, for instance, a trustee has sold out stock in the funds, in breach of trust, there is no necessity for proving the person to whom he sold it. In a bill by surety for a contribution from his co-surety, in respect of money which he had paid, the insolvency of the principal was stated, but held not necessary to be proved, because the principal also had been made a party, and the decree might direct him to pay the co-surety. (*a*) A plaintiff in possession, whose claim as tenant in tail, under the marriage settlement of his father and mother, had neither been admitted nor denied by the answer, was not bound to prove their marriage, by affidavit, before he showed cause against dissolving an injunction to restrain an ejectment. (*b*) When Irish property has been conveyed by lease and release, it is not necessary to give any proof of the lease. (*c*) At common law, in a case of replevin, the defendant avowed taking the cattle as damage feasant; the plaintiff pleaded that J. S. had, on the 30th of March, demised to him a house with common appurtenant, to hold from the Lady-day preceding for a year; the defendant traversed the lease *modo et formâ*, and proved it to have been dated and executed on the Lady-day itself; but it was held to be immaterial. (*d*) So where the defendant in replevin made cognizance for two years and a quarter's rent in arrear; and alleged that for a long time, viz. for two years and a quarter ending at Christmas, 1803, the plaintiff held and enjoyed the premises as tenant thereof to A. B. by virtue of a certain demise, &c., to which the plaintiff pleaded in bar that he did not hold and enjoy the premises as tenant thereof to A. B. by virtue of the supposed demise *modo et formâ;* it was held sufficient to entitle the defendant when he proved that the

[170]

(*a*) Lawson *v.* Wright, 1 Cox, 277. [By an Order of May, 1841, No. 32, "In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable;" Sand. Ord. 883-4.]

(*b*) Hodgson *v.* Dean, 2 S. & S. 221.

(*c*) [The Irish Acts, 9 Geo. 2, c. 5, and 1 Geo. 3, c. 3,] see in Daly *v.* Kelly, 4 Dow. 435; [and see 4 & 5 Vict. c. 21, as to lands in England. But not conversely, see Snell *v.* Silcock, 5 Ves. 469.]

(*d*) Pope *v.* Skinner, Hob. 72.

plaintiff held of A. B. from the 23rd of December 1801, and to recover for two years' rent. (*a*) The case itself will generally show whether when a tender or demand is pleaded, it is necessary to prove the exact sum. If a debtor has offered to pay, it is only material for him to prove that he did not offer less than the sum due, and that he stated specifically on what account the tender was made. (*b*) So in a demand, it is only material for the creditor to show that he specifically stated the nature of his claim, and that he did not ask for more. But [at law] if, in *assumpsit*, to a plea of tender the plaintiff replies a subsequent demand and refusal, it is incumbent on him to prove that after a tender admitted in the pleadings be demanded of the defendant the exact sum specified as having been before tendered and refused. (*c*)

Variance.

It has been mentioned that at Common Law there is exacted an almost unreasonable strictness of proof, even to the very letter, of the averments in the pleadings, and that consequently the cases respecting Variance are extremely numerous. (*d*) On the contrary the Courts of Equity have usually shown indulgence in cases of inaccuracy, whether caused by mistake or by deficiency of information. In some instances however they have [171] been equally inflexible. The Court of Exchequer has required moduses to be stated with scrupulous exactness. (*e*) And with respect to other customs Lord Hardwicke blamed the nicety

(*a*) Forty *v.* Imber, 6 East, 435.

(*b*) Wade's case, 5 Co. 115 *a*; Warner *v.* Harding, Latch. 70.

(*c*) Spybey *v.* Hide, 1 Camp. 181; Rivers *v.* Griffith, 5 B. & A. 630. [As to tender and proof thereof generally, and under an agreement, see case of tender for salvage services. The William Hannington, 9 Jur. 630.]

(*d*) *Vide supra*, p. 2. The rule is subject to these two modifications; that "an averment which is merely matter "of inducement to the action need not "be proved with the utmost strictness "and precision," 1 Phill. on Ev. 195; and that "if the whole of an averment "may be struck out without destroying "the plaintiff's right of action, it is not "necessary to prove it," for it is mere surplusage; "but otherwise if the "whole cannot be struck out without "getting rid of a part essential to the "cause of action;" Lawrence, J., in Williamson *v.* Allison, 2 East, 452. Thence it follows that allegations which are *descriptive of what is material*, are as necessary to be proved as if they had been essentially material themselves; see 1 Stark. on Ev. 383. [But on this subject see Phill. Ev., 9th ed., Ch. 11, p. 497, *et seq.*, and stat. 7 Geo. 4, c. 64, s. 20. Ib. 515; stat. 9 Geo. 4, c. 15, (Lord Tenterden's Act,) Ib. 516, and stat. 3 & 4 Wm. 4, c. 42, s. 23, Ib. 517.]

(*e*) Blake *v.* Vesey, 3 Dow. 189, 2 Eag. & Y. 699. But the rule has of late years been relaxed, see Miller *v.* Jackson, 1 Y. & J. 81.

with which that Court expected them to be set forth, declaring the practice to be different in Chancery. (*a*) But in either Court, as at Common Law, an agreement must be proved as stated, or the bill be dismissed. (*b*) Where a party has failed to prove the terms of the agreement he relies on, the Court will not assist him by directing an issue to ascertain the terms: if he be plaintiff in the suit, it is incumbent on him to state in his bill the agreement of which he calls on the Court to decree the performance, and to prove that agreement as stated. (*c*) A bill stating an agreement for a lease for three lives was dismissed, though the answer admitted it in every respect, except asserting that it was for one life instead of three. (*d*) Dismissal was only escaped by a compromise where the plaintiff stating an agreement to grant him a lease was unable to rebut the defendant's assertion that the agreement was to grant the lease jointly to the plaintiff and another person. (*e*) There are numerous cases at Common Law on the subject; (*f*) and from the whole it appears that in agreements every particular that is in any degree of the essence of the contract is a material averment. Consequently evidence of each particular component part is not only not impertinent, but is absolutely necessary. Lord Redesdale, in the case last cited, shows this strictness to be founded on a just principle, namely, "to compel parties who come for the execution of agreements, to state them as they ought to be stated, and not to set up titles which when the cause comes to a hearing they cannot support." The Courts however in these cases so far show indulgence that, although they refuse to allow

Agreements, to be proved as stated.

[172]

(*a*) Dean and Chapter of Ely *v.* Warren, 2 Atk. 190. [But when answer to a bill for an account of tithes, insisted upon what was equivalent to a prescription *in decimando*, and defendant's evidence went to the same point, the Court would not permit evidence to be read to support a different defence, viz. a presumption that the tithes had been granted to the owner; Nash *v.* Thorn, 2 Cox, 197. As to evidence of a modus, *vide infra*.]

(*b*) Lord Loughborough in Mortimer *v.* Orchard, 2 Ves. 243, where however, under the special circumstances, he gave a decree in the terms of a somewhat different agreement, confessed by the answers. And see Legh *v.* Haverfield, 5 Ves. 452. [So, in the Admiralty Court, a tender must be proved as pleaded; Case of the William Hannington, 9 Jur. 630.]

(*c*) Lord Manners in Savage *v.* Carroll, 2 B. & B. 451; and see Daniells *v.* Davidson, 16 Ves. 249.

(*d*) Lindsay *v.* Lynch, 2 Sch. & Lef. 1.

(*e*) Deniston *v.* Little, 2 Sch. & Lef. 10, note.

(*f*) See them collected in 2 Stark. on Ev. 46, 48. [*Sed vide supra*, p. 242, n. (*d*).]

amendment, they will generally dismiss the bill without prejudice to the filing of another.

Party must prove the whole as stated,

There is a greater appearance of hardship in a party [being, as he sometimes has been, compelled] to prove a circumstance which he has inadvertently mentioned, when [such statement] was in point of fact totally immaterial. Thus a power of attorney to institute a suit in the name of the plaintiff having been stated in the bill, but not proved, the Vice Chancellor, though he said that it had been unnecessarily stated, ordered that it should be proved before the Master. (*a*) The principle of the following case would probably be recognized by a Court of Equity: There being several classes of persons whose names may lawfully be inserted in an insurance policy, under the stat. 28 Geo. 3, c. 56, the plaintiffs needlessly described themselves as belonging to one particular class, and they were held to their averment, though, if that specific averment had been omitted, they might have proved themselves to belong to any class mentioned in the act. (*b*) Perhaps also of the following: in an action for an escape out of execution the declaration alleged that the prisoner was, by *habeas corpus*, brought before a Judge of the King's Bench, and by him committed to the custody of the Marshal, "as by the said writ of *habeas corpus*, and the said commitment thereon, now remaining in the said Court more fully appears:" it was held that the allegation must be proved as laid, and that evidence of a commitment by a Judge of the King's Bench, but not filed of record, would not support the action. (*c*) Lord Alvanley said in this case, "We all know that if a party derive his right of action against the debtor through a variety of deeds, instead of charging him generally, by virtue of divers mesne assignments, he must prove the deeds
[173] as stated: so if a party claiming under a demise take upon himself to state a demise by indenture, he must prove his allegation; though a general averment of a demise would have been sufficient." Thus it sometimes happens that though the

(*a*) Edney *v.* Jewell, 6 Mad. 165.
(*b*) Bell *v.* Jackson, 1 M. & S. 201.
(*c*) Turnor *v.* Eyles, 3 B. & P. 456.

allegation itself may be immaterial, the evidence in support of it is by no means so.

but must not prove more.

Where any thing is set forth as a whole, an addition is manifestly equivalent to a variation, and therefore must not be given in evidence. Thus where letters were stated as forming an agreement, no proof *aliunde* of additional terms was receivable. (*a*) But a vicar demanding certain tithes *nominatim*, with a general claim for all small tithes, was not precluded from giving evidence that tithes not specifically named were due to him. (*b*)

IV. Needless prolixity, and superfluity.

Fourthly; With respect to needless prolixity and superfluity, Lord Eldon said, in *Slack* v. *Evans*, (*c*) "If I decide with the Master, I must decide that this prolixity is not impertinent, which I should be very reluctant to do. If in an examination the examinant sets forth tradesmens' bills at length, it is impertinent. Needless prolixity is itself impertinent, though the matter should be relevant." The Orders in Chancery speak of "tautologies, multiplication of words, or other impertinencies occasioning needless prolixity." (*d*) An examination setting out material accounts clearly and conveniently, is not rendered impertinent by varying from the strict course pointed out by the interrogatories, nor by introducing three columns of figures so as to introduce blank columns and great prolixity in the office-copy. The fault lay in the office; the blank columns are an abuse. (*e*)

This objection of immateriality on the ground of superfluousness, was attempted to be used for the advantage of the party who had brought forward the evidence, in a case in which the defendants relied upon some forged instruments. Lord Hardwicke however would not hear of their materiality being ques- [174]

(*a*) Birce *v.* Bletchley, 6 Mad. 17; it would have been different if the letters had been adduced as *proofs* only of the agreement.

(*b*) Manby *v.* Lodge, 6 Pri. 231.

(*c*) 7 Pri. 278, note. [As to Impertinence, *vide supra*, p. 214, *et seq.*]

(*d*) Bea. Ord. 70, 166. [As to Prolixity in general "in any pleading, petition, or affidavit," see the Order of May, 1845, No. 122, Sand. Ord. 1019; and see (for analogy sake) that, in the Chancery of Ireland, an affidavit cannot be read pending a reference for prolixity. St. John *v.* B., 1 Hog. 41.]

(*e*) Bally *v.* Williams, 1 M'Cl. & Y. 334; [and see Gompertz *v.* Best, 1 Yo. & C. 114.]

tioned, but compelled the party to submit to all the disadvantages of having set up so iniquitious a defence. (*a*)

(*a*) Kent *v.* Mackrell, 2 Ves. 579. [When an instrument is, by *primâ facie* evidence, shown to be false, the proof of its genuineness and validity is thrown on the party claiming under it; 2 Sch. & L. 502. Where there is *primâ facie* evidence of a right existing in a person, the *onus* is upon the person calling such right in question, see the Banbury Peerage Case, 1 S. & S. 155, 15 Ves. 432; and see Williamson *v.* Lonsdale Lord, Dan. 171; Chalmers *v.* Bradley, 1 Jac. & W. 65. As to the distinction between *primâ facie* and conclusive evidence, see the observations of Mr. Starkie, in his Treatise on Evidence, 3rd ed., Vol. I, p. 544, *et seq.*]

SECTION II.

EVIDENCE SECONDARY.

THIS objection requires explanation, and has important limitations. The general rule is, that the best evidence must be produced of which the nature of the matter to be proved is capable. It is not however by any means "to be understood from this that the law requires that nothing under the highest assurance possible shall be given in evidence to prove any matter in question;"—"but the true meaning of the rule is that no such evidence shall be brought as *ex naturâ rei*, supposes still a greater evidence behind in the party's own possession or within his power; for such evidence is altogether insufficient and proves nothing, because it carries a presumption with it contrary to the intent for which it was produced. (*a*) As if a man offers a copy of a deed or will, where he ought to produce the original, this carries a presumption with it that there is something more in the deed or will that makes against the party, or else he would have produced it; and therefore the copy in such a case is not evidence." (*b*) This definition of

Objection explained.

Presumption arising from production of secondary evidence.

(*a*) [On a similar principle the suppression of some of a series of documents relating to the title, which are admitted to be in the possession of a party, is deemed evidence that the documents withheld afford inferences unfavourable to the title of the party; James *v.* Bion, 2 Sim. & St. 600. But see Bacon's Apothegm, 43; as to passing over one deed and using another.]

(*b*) Gilb. on Ev. 15, 17. Willes, C. J., gives rather a wider meaning to the term, and calls the evidence of a heathen secondary in comparison with that of a Christian; Omychund *v.* Barker, Willes, 553; [which is similar to the confusion of the terms competent and credible, when applied to a witness. But it is obvious the learned judge here had in view only the inferiority as to credit. And in this sense the word seems used, when it is said that, in the Chancery of Ireland, if a settled account is opened in the absence of fraud, a great latitude is given to the admission of secondary evidence; Kilbee *v.* Sneyd, 2 Moll. 207. It has been ruled at Law that there are no degrees in *secondary* evidence; (meaning no degrees of preferability, except as to credibility,) so that where *secondary* evidence of a document is admissible at all, parol proof of it is sufficient; although it may appear that an attested copy, or some other apparently superior but yet only *secondary* proof, is in existence; Doe *v.* Ross, 7 M. & W. 102, S. C., 8 Dowl. 389. But this rule requires to be used within the bounds of reason, *e. g.* The copy of a copy of

Parol evidence as to deeds, &c.

C. B. Gilbert is rather too narrow; it may be conveniently extended so as to comprehend parol testimony introduced for the purpose of elucidating deeds or wills, a species of evidence [175] to which the Courts will resort, not only when the document itself, (the best evidence of what was done or intended,) cannot be produced, but also, under certain circumstances, when it is defective or ambiguous. [But this last kind of evidence is Extrinsic. extrinsic and subsidiary rather than secondary; and as such we shall have occasion to enlarge on it hereafter, especially under the head of parol evidence to explain deeds, wills, &c.]

The general rule that the best evidence must be produced, extends to every kind, whether Oral or Documentary.

I. When the best evidence would be oral.

First, then, we will examine how far it applies to Oral testimony.

When witnesses speak of something that has been done by a person who might have been examined as well as themselves, or of something that has fallen peculiarly under the observation of such a person, and when he, from the nature of the transaction, might explain it as fully and accurately or more so than they can, their testimony, which might have been admitted to corroborate his assertions, is vitiated by his absence. So strong a suspicion is raised of that person's having something within his own secret knowledge which will not bear cross-examination, that the Courts have thought it better, under such circumstances, to reject the secondary evidence *in toto*, or, (which amounts to the same thing), to hold it nugatory. (*a*) Thus when a ship had been destroyed by a combustible material called *roghan*, put on board by an officer of the East India Company, the point being whether notice of its nature had been given to

a *fi. fa.* was rejected in Everingham *v.* Roundell, 2 Lew. Cr. Ca. 157. However, where such obviously superior *secondary* evidence is kept back, it is a fact from which a jury may and sometimes will presume it would be adverse to the party withholding it; see in Doe *v.* Ross, remarks by Lord Abinger, C. B., and those by Patteson, J., in Brown *v.* Woodman, 6 C. & P. 206. It is almost superfluous to observe, the like presumption might be urged to exist in equity. By analogy to James *v.* Eion, *ut supra*. But see a witty story, Bacon's Apoth. 43, referred to above.]

(*a*) [Where not warranted by those circumstances which, as we shall see, in certain cases justify its admission, the objection is taken that it is not evidence. So in the Ecclesiastical Courts, the rule is, that secondary evidence is not admissible, without accounting for the non-production of the best evidence; Woods *v.* Woods, 2 Curt. 522.]

the mate, who was since dead, a written order sent with it containing no such notice was proved, and the captain and second mate denied notice; but Lord Ellenborough said, "The question is, whether the plaintiff has given sufficient *primâ facie* evidence of the want of notice to have gone to a jury? and we are of opinion that he has not. The best evidence should have been given of which the nature of the thing was capable. The best evidence was to have been had by calling in the first instance upon the persons immediately and officially employed in the delivery and in the receiving the goods on board, who appear in this case to have been the first mate on the one side and the military conductor on the other. And though the one of these persons, the mate, was dead, it did not warrant the plaintiff in resorting to an inferior and secondary species of testimony." (*a*) [176]

Impossible to produce a witness.

But if the Court be satisfied of the impossibility of producing the witness who would have been able to give the best evidence, then secondary evidence, that is to say, the next best, will in most instances be received. The death or incapacity (*b*) however of one witness will not open the door for secondary evidence, (*c*) if *primary* can be given by any one else. (*d*)

In case of his death.

When the individual in question is dead, the secondary evidence becomes admissible on the usual proof of his burial, the certified extract from the parish register, and some evidence of

(*a*) Williams *v.* E. I. Co., 3 East, 201. When witnesses speak of something that has been said not on oath by a person who is not produced, or of information which he has given by a letter or any other writing, the principle of which we are here treating, holds with equal force; but such evidence belongs also to the extensive subject of Hearsay, and will be more conveniently placed under that title, in the following section. As to declarations of facts made by persons likely to know, contrary to their interest, or made in execution of a duty, and they since deceased, *vide infra.*

Where entries were made by the clerk of the deceased steward of the receipt of monies which the latter, by carrying it to be audited, had adopted; held that they were admissible in evidence without calling the clerk, who was still living. Doe *v.* Graham, 1 Gale & D. 551.]

(*b*) [In cases of deaf and dumb persons, see (for analogy sake only) Rex *v.* Pritchard, 7 C. & P. 303, and Rex *v.* Dyson, ibid. *notis*, and 1 Hale, 34, as to persons so afflicted charged with felony.]

(*c*) [As to secondary evidence by means of evidence of declarations or entries made by deceased persons *vide post*, Hearsay, one class of which this forms.]

(*d*) Coghan *v.* Williamson, Doug. 93; Williams *v.* E. I. Co., 3 East, 201; Adam *v.* Kerr, 1 B. & P. 360; and the case quoted above, Williams *v.* E. I. Co., 3 East. 201. [Yet see Middleton *v.* Melton, 5 M. & R. 264, cited *post*, where it would seem primary evidence could have been given.]

identity;(a) sometimes mere affidavits without the register have been held sufficient. (b) The Court refused to *presume* death without proof of inquiry, even though fifty years had elapsed. (c) But at the expiration of thirty years proof of the attestation of a deed is dispensed with altogether, on the general presumption, which is not allowed to be rebutted, that the attesting witnesses are dead.

Presumption of his death.

In case of his sickness, the Courts of Equity have little difficulty, for then a commission is sent, or in London the Examiner attends, to take his examination at his own residence. But at a trial, satisfactory evidence is required of the fact that the intended witness is too ill to appear in person,—the oath of some one who has lately seen him,—if possible, of the surgeon who attends him. (d) Much however depends upon the importance of the matter to be proved. To prove that a plaintiff had paid taxes, it was sworn that the tax-gatherer had attended to give evidence two days before, but had been carried away in an apoplectic fit, and was then lying *in extremis* given over by his physicians,—and receipts in his handwriting were tendered. But Lord Ellenborough refused to do more than postpone the trial: for, he said, he was afraid to establish a precedent which might cause many sudden indispositions and recoveries; he observed too that as the witness would probably die before the

In case of his sickness.

[177]

(a) [See Brindley *v.* Woodhouse, 1 Car. & K. 647, and see 13 Law J., N. S. R. 101. As to proof of death and identity, under all the various circumstances which may apply to each particular case, see Hubb. on Ev. of Succ., Index, tit. Death and Identity; where the whole subject is treated of in a manner and at such length as to preclude almost all necessity for more than this reference, except it be to draw the particular attention of the reader to No. XIII. in the Appendix to that work. p. 769, the case of Att. Gen. *v.* Culverwell, before Lord Langdale, M. R, and that of Leach *v.* Leach before V. C. Knight Bruce (both in 1844) determining that a certified copy of register under 6 & 7 Wm. 4, c. 86, is not sufficient evidence of death, whereupon to direct payment out of Court; not being the *best* evidence. And as to this statute and its accompaniment, c. 85, *vide post.* Production of probate copy of a will is no evidence at all of decease of the person, *vide infra.* Grant of administration by Ecclesiastical Court, and copy of entry in register of decease of a person is not sufficient evidence of his death, affidavit required of the fact, by V. C. Bruce, Leach *v.* Leach, 8 Jur. 211; 13 Law J., N. S., R. 101.]

(b) Carrington *v.* Cornock, 2 Sim. 569; [and see Leach *v.* Leach, No. XIII, in App. p. 769, Hubb. on Ev. Succ.]

(c) Benson *v.* Olive, Str. 920. [But as to presumption of death see Rust *v.* Baker, 8 Sim. 443, and other cases collected below; and more at large, Hubb. on Ev. of Suc., particularly No. XIV. Appendix, p. 769; Watson *v.* England.]

(d) Luttrell *v.* Reynell, 1 Mod. 184; Andrews *v.* Palmer, 1 V. & B. 22. And see R. *v.* Morphew, 4 Taunt. 602.

ensuing sittings, evidence of his handwriting might then be received without any risk of collusion. (*a*) In some instances the fact speaks for itself without evidence, as in a case where the witness could give but an imperfect testimony on account of blindness; (*b*) or where a witness is carried ill out of Court. One malady, namely, unsoundness of mind, which is manifestly an equal incapacity in either Court, and indeed amounts to total incompetency, ought to be proved by the return to the commission of lunacy if there has been one; otherwise by such evidence as would be given in cases of ordinary sickness. (*c*) Leprosy, was a bar to even the appearance in Court of the sufferer; but then the unfortunate person must have been as Bracton expresses it, "*leprosus et tam deformis quod aspectus ejus susteneri non possit.*" (*d*)

Witness incapacitated; blind,— insane.

The incompetency of the best witness, on other grounds, very frequently appears upon the face of the proceeding. (*e*) If not, the facts must be proved in the same manner as other facts. But then a question may arise whether he has become incompetent through the act of the party who ought to have called him, for then no indulgence can be shown. (*f*)

In other cases of incapacity to be proved.

Absence from the country is considered in the Courts of Equity as a very little obstacle to the examination of a witness, (*g*) if it be known where a commission would be able to find him, but that process is obviously liable to a variety of miscarriages, such as the refusal of a witness to be examined, or the interference of the local powers. The latter circum-

In case of his absence from the country.

[178]

(*a*) Harrison *v.* Blades, 3 Camp. 458.

(*b*) Kinsman *v.* Croke, 2 Lord Raym. 1166. [But see Crank *v.* Frith, *supra*, p. 174-5, n. (*b*).]

(*c*) In R. *v.* Eriswell, 3 T. R. 707. A case sent from the Quarter Sessions found that a pauper was insane, and Mr. Justice Buller said, he considered him as "*quâ dead.*" As to the proof, see Atty. Gen. *v.* Parnther, 3 B. C. C. 443. [*Et vide supra*, p. 233, n. (*b*), as to proof of insanity.]

(*d*) Co. Litt. 135, *b.*

(*e*) [Although the late act 8 & 9 Vict. c. 85, has in most cases removed the bar of incompetency, whether arising from infamy or interest, still there may be sufficient relevancy in these observations, *vide supra.*]

(*f*) Hovill *v.* Stephenson, 5 Bing. 493.

(*g*) [But, at law, a deed executed in the presence of a subscribing witness, proved to be abroad at the time of the trial, is admissible, on proof of the witnesses handwriting, notwithstanding the power to examine on interrogatories, under stat. 1 Wm. 4, c. 22, s. 4, Glubb *v.* Edwards, 2 M. & R. 300. And a subscribing witness residing in Dublin, held to be out of the jurisdiction of the Courts of this country; so as to let in proof of his handwriting, the same as if he were dead, Doe d. Counsell *v.* Caperton, 9 C. & P. 112.]

stance occurred when the King of Sweden refused to permit a secret examination within his dominions, (*a*) and similar obstructions were likely enough to have taken place, in those cases, in which parties have been so adventurous as to carry commissions into an enemy's country. In such instances the certificate of the commissioners would be the evidence, on which the Court would rely for the facts.

Not to be found,

But when it is not known where the witness can be found, there is a considerable difference. In an old case in which the plaintiff himself swore that he had "endeavoured to find his witness, but that he could not see him nor hear of him," the Court said "that if a party cannot find a witness then he is, as it were, dead unto him." (*b*) Later decisions have shown that where the evidence is not of the first importance no very strict diligence of search is demanded, (*c*) particularly when the witness is only required to declare whether he wrote or did not write a signature or paper produced, and other witnesses can swear to the handwriting; (*d*) for the Court readily attributes his avoiding to appear, to collusion with the adverse party. (*e*) Of such collusion there is, very properly, an extreme jealousy: an examination *de bene esse* on the part of the East India Company of one of their own captains who was on the point of sailing, was refused, because they might have employed another captain. (*f*) The rule is not, even at law, construed with such strictness as to vitiate secondary evidence if the witness having set out for his journey beyond

collusion suspected.

[179]

(*a*) Gason *v.* Wordsworth; [Ambl. 108, S. C.]; 2 Ves. 337. [And therefore in that case the depositions taken *de bene esse* allowed to be read.] In another instance, "the Great Duke of Tuscany laid several persons by the heels, for executing a commission to examine witnesses in his dominions without his leave." Hutchins *arg.* in Cowslad *v.* Cely, Ch. Pr. 83.

(*b*) Anon. Godbolt, 326.

(*c*) But the Court will sometimes require the particulars of the search to be stated; Green *v.* Gatewick, cited in Bull. N. P. 243; Fulconer *v.* Hunson, 1 Camp. 172. [And see Robinson *v.* Martin, 2 Moo. & R. 375, where the evidence of the absence of the witness was not sufficient to let in his depositions.]

(*d*) Coghlan *v.* Williamson, Doug. 93; Adams *v.* Kerr, 1 B. & P. 360; Barnes *v.* Trompowsky, 7 T. R. 266; Wallis *v.* Delancey, ib. (note); Cunliffe *v.* Sefton, 2 East, 183; Crosby *v.* Percy, 1 Taunt. 365; Burt *v.* Walker, 4 B. & A. 697; Parker *v.* Hoskins, 2 Taunt. 223. Proof of the handwriting of a person in a foreign country is allowed even though it be well known where he is residing; *vide infra.*

(*e*) Waring *v.* Bowles, 4 Taunt. 132.

(*f*) E. I. Co. *v.* Naish, 2 Fowl. 128.

the jurisdiction, is driven back by contrary winds and detained in England till the day of the trial. (*a*) For the purpose of satisfying the Court of Equity that due search has been made, evidence may be given before the examiner or commissioners; if that has been omitted, the Court will consent without much difficulty, when the objection is raised, either to receive affidavits on the point, or to direct an inquiry. When depositions taken *de bene esse* are the secondary evidence proposed, then the circumstances are shown by the affidavits filed in support of the motion for their publication. (*b*)

Proof of due search.

Persons holding public situations have sometimes been permitted to send certificates of the matters in question, instead of attending personally, if in England, or having a commission sent to them, if abroad. Thus a certificate of the Secretary at War respecting the nature of a serjeant's station, was admitted in the King's Bench, although opposed. (*c*) Lord Coke enumerates six kinds in ancient times; the certificate of the King's Marshal of the Host that a man was serving in the army; that of the Mayor of a town in France that a person was in his custody as prisoner; that of the Lord Mayor and Aldermen by the Recorder as to the customs of London; (*d*) that of the Sheriff whether a man was a citizen or a foreigner; that of a Judge to prove records; (*e*) and that of the Ordinary to prove marriage, bastardy, excommunication, or profession. (*f*)

Public officers' certificates.

[180]

(*a*) Ward *v.* Wells, 1 Taunt. 461.

(*b*) [As to which, *vide supra*, p. 142.]

(*c*) Lloyd *v.* Woddall, 1 Bl. Rep. 29.

(*d*) This still continues. The Recorder delivers the certificate *ore tenus* at the bar, and then hands in a copy of it. Plummer *v.* Bentham, 1 Burr. 248, is said by the reporter to have been the only instance in the K. B. since Henry VI.'s reign, though it had happened in the Court of Chancery. A custom once certified is looked upon as law and cannot be certified again; Lord Mansfield in Blacquiere *v.* Hawkins, 1 Dougl. 380. [If the Lord Mayor and aldermen of London have once certified a custom the certificate is conclusive; and a Court of Equity never refers the question a second time; Burin *v.* Knott, 12 Sim. 436.] A custom for the profit of the city cannot be certified by the mouth of the Recorder; Day *v.* Savadge, Hob. 87, and see 2 Com. Dig. 184.

(*e*) [But now as to records, *vide supra*, 147, *et seq.*, and see stat. 1 & 2 Vict. c. 94, particularly ss. 11, 12, and 13, as to certified copies of such, noticed below, Pt. III. ch. 1, s. 2.]

(*f*) Co. Litt. 74 *a.*; and see 9 Co. Rep. 31 *b.*; and Dyer, 313 *a.* [A *flat* signed by the Archbishop of Canterbury, for a special license for marriage at a private house, and the affidavit on which founded, produced from the proper ecclesiastical office, with a parish register, stating such private marriage by license, held admissible at law, as confirming the evidence of reputation and cohabitation, without production of the original license; Doe *v.* Grazebrook, 3 Gale & D. 338.]

These were called Trials by certificate and were conclusive. (*a*)

Judges. In an old case the Court said that they would give credit to a certificate from the Judges in Wales respecting the practice of

Justices. their Courts. (*b*) With respect to highways there has been a long established usage for certificates of the justices to be re-

Notary public, ceived as to encroachments or repairs. (*c*) A protest as to the presentment and non-acceptance of a foreign bill of exchange, attested by a notary public, is said to be evidence of those facts in an action upon the bill. (*d*) In the great cause of *Omichund* v. *Barker*, (*e*) Willes, C. J., says, "The proper and usual evidence of a fact arising beyond sea is an affidavit

certified so to be, or deposition taken before a public notary and certified to be so under the seal of the place or the principal officer of the place, which has been admitted in evidence in such cases, where it would be too expensive considering the nature of the cause, to take out a special commission."

has credit everywhere. [Lord Eldon also decided that a notary public has credit everywhere, but the certificate of a magistrate of a colony abroad requires evidence of his being so. (*f*)]

[181] These must however be considered as mere exceptions to

In general certificates disallowed. the general rule that "no certificates can be allowed," which is so strict as to extend even to the King's sign-manual. So at least has been the universal opinion ever since the time of James the First; in that reign it was received by two successive Chancellors as evidence of a condition relating to lands, (*g*) but the question seems even then to have been much

(*a*) See the judgment of Eyre, C. J., in Ilderton *v.* Ilderton, 2 H. Bl. 155.

(*b*) Broughton *v.* Randal, Cro. El. 502. [As to the signatures of the Judges, see 8 & 9 Vict. c. 113, s 2; and stat. 1 & 2 Vict. c. 94, cited below.]

(*c*) R. *v.* Randall, 1 Keb. 526; R. *v.* Mawbey, 6 T. R. 634, and the cases cited there.

(*d*) 1 Phill. on Ev. 382.

(*e*) Willes, 550.

(*f*) Hutcheson *v.* Mannington, 6 Ves. 823. [And see Gurney *v.* Hibbert, 1 Jac. & W. 180. Since by stat. 6 Geo. 4, c. 87, s. 20, a British consul, at a foreign port, is empowered to do all notarial acts which any notary public may do; that of certifying the handwriting and authority of a party taking the affidavit of acknowledgment of a married woman, held to be included; *in re* Barber, 2 Bing. N. C. 268; 2 Sc. 436, and 4 Dowl. 640.]

(*g*) Abignye *v.* Clifton, Hob. 213, Wooddeson remarks upon this case, "It would have been characteristic of this monarch to exclaim

"Juramenta petis? Regum jurare minori
Turpe reor: nudo jus et reverentia verbo
Regis inesse solet, quovis juramine major;"

discussed in the profession. The certificate of a British Vice-consul at the Brazils of the amount of the proceeds of damaged goods, which by the law of that country are to be sold under his inspection, was not received, the Court saying that any person present might have proved the facts. (*a*) There are several Acts of Parliament which make certificates evidence in particular instances, but as they generally thereupon become the *best* evidence of the facts, they would be out of place if we introduced them here. (*b*) British consuls. [182]

Sometimes, on the same ground, the Courts will dispense with the attendance of a person who is engaged in duties of extensive utility, as the cashier of the Bank of England when a prisoner is on trial for forging his name. Sometime, (although it is generally refused,) a Judge will receive the affidavit of a surgeon who resides at a considerable distance, to prove the illness of a witness. But in such cases as this, and several others that have been mentioned above, the rule is more or less strict, according as, with due regard to the importance of the point to be proved, to the magnitude of the matter in dispute, and to the general features of the case, substantial justice appears to dictate. Excuses for the absence of the best witness.

and many of his Judges were ready to sacrifice to his vanity with pliant adulation. But the legality of admitting this evidence was justly questioned by a very great contemporary authority. In the second year of Charles 1, the House of Lords referred it to the Judges generally, whether in cases of treason and felony the King's testimony is to be admitted, but the King prohibited them from giving their opinion. As to appearing personally and being sworn in Court, that seems wholly inconsistent with the royal dignity." 3 Wood. Vin. Lect. 275. When a similar certificate was brought before Lord Coke, about the same time, he scrupled to admit it, for he said he had never heard of the like case, but he advised the plaintiff to compromise the suit, saying "that he had learned a rule in his youth, which was this,

"Cum pare luctare dubium, cum principe stultum est,
Cum puero pœna, cum muliere pudor."

Sir Henry Lea and Henry Lea's case, Godb. 198; and see 2 Rolle's Abr. 686; Willes, C. J., in Omichund *v.* Barker, Willes, 550. [In the Court of Admiralty, the assertions of Princes are not admitted as conclusive legal proof; Twee Gebroeders, Northolt, 3 C. Rob. 338.]

(*a*) Waldron *v.* Combe, 3 Taunt. 166; and see Roberts *v.* Eddington, 4 Esp. Rep. 88. [*Sed vide supra*, stat. empowering consuls to act as notaries.]

(*b*) *Vide supra*, p. 157; *infra*, P. III. ch. 1, § 3. (2). [By way of an example only, certified copy of return by a banking co-partnership under stat. 7 Geo. 4, c. 46, admitted in evidence; Bosanquet *v.* Woodford, 5 Ad. & El., N. S. 310; but now see stat. 8 & 9 Vict. c. 113, *supra*, p. 157.]

What evidence admitted as secondary.

Carrying with us the last observation to this part of our subject also, we will proceed to inquire what secondary evidence is admitted when the door has been opened by proof of the impossibility of producing the witness who could have furnished the best. (*a*)

Depositions *de bene esse.*

Depositions *de bene esse*, when they have been taken, afford the most direct resource. (*b*) An order must however have been made for their publication, as we have seen in the preceding chapter. (*c*) One case, mentioned there, deserves particular notice here also, that in which the officer who had the depositions in his custody was ordered to attend with them at the trial, that they might be there published and used in case the illness of the witness should be proved to be still continuing unabated. (*d*) Where depositions had been taken *de bene esse*, and it was adjudged on demurrer or plea that the plaintiff was not entitled *in præsenti*, but his bill was never
[183] dismissed; on a motion, about forty years afterwards, that they might be published, together with the depositions in a supplemental suit, they were published, without prejudice to exceptions at the hearing; upon affidavit that several of the witnesses were

Objections to such.

dead, and that nothing could be learnt of the rest. (*e*) When they have been taken, before the defendant has answered or been put into contempt, or without giving him an opportunity for cross-examination, he may prevent their reception in the

(*a*) [No degrees, *vide supra*, p. 247, n. (*b*).]

(*b*) [By an Order of 1618-19, Bacon, C., "Decrees in other Courts may be read upon hearing, without the warrant of a special order. But no depositions taken in any other Court are to be read but by special order; and regularly the Court granteth no order for reading of depositions except it be between the same parties, and upon the same title and cause of suit;" Sand. Ord. 118.

By an Order of May, 1661, Clarendon, C., "Where either plaintiff or defendant obtaineth an order to use depositions of witnesses taken in another cause, the adverse party may likewise use the same, without motion, unless he be, upon special reason showed to the Court by that party first desiring the same, inhibited by the same order so to do;" Sand. Ord. 304.

Depositions of a witness examined *de bene esse*, he dying before he was examined in chief, ordered to be read at a trial at law; Marsden *v.* Round, 1 Vern. 331. Where depositions taken in a suit to perpetuate testimony are required to be read on a trial at law, not under the control of the Court of Equity, the rule is merely for the officer to attend with and produce them; the parties to make such use of them as by law they may do; Att. Gen. *v.* Ray, 2 Hare, 518. At law, the rule is fixed, unless deponents are dead their depositions are not admissible; Holcroft *v.* Smith, 2 Freem. 259.]

(*c*) *Vide supra*, p. 141, *et seq.*

(*d*) Andrews *v.* Palmer, 1 V. & B. 22.

(*e*) Hamilton Duke of, *v.* ———, 2 Ves. 497.

Courts of Law, unless there be a special order to prevent his doing so. (*a*) It was considered a reason for granting such an order, that the defendant had joined in the commission; although to do so before answer was irregular. (*b*) It is said, however, that such an order though it binds the defendant, is not binding on the Courts of Law. (*c*) But when an opportunity has been given for cross-examination, though not used, it removes the objection; Lord Ellenborough considered the Equity Court to have decided upon the sufficiency of the opportunity when the order for publication ran thus, "it was prayed that the depositions of the witness may be published in order that the same may be read as evidence for the plaintiffs at the trial, whereupon this Court doth order that the depositions may be forthwith published." (*d*)

Those taken in Courts of Law.

Courts of Law, as it has been before mentioned, (*e*) have now by Act of Parliament, (and had before, by rather an arbitrary exercise of their authority,) the power of ordering examinations to be taken *de bene esse*. (*f*) The depositions could not however be brought into question in a Court of Equity unless the suit were strictly between the same parties, (or those claiming under them,) (*g*) and on the same matter, and were perfectly unobjectionable in other respects, since the Court of Law in which they were taken, has no control over the suitors in equity to compel them to waive objections. (*h*)

[184]

Defective depositions.

Sometimes depositions which were defective, and which would have been suppressed, have in consequence of the death of the witness been taken as sufficiently good to be

(*a*) Brown's case, Hardr. 315; Dutton *v.* Colt, Sir T. Raym. 335; Cazenove *v.* Vaughan, 1 M. & S. 8; Gilb. on Ev. 65. [Witness examined in chief dying before he could be cross-examined, his depositions to stand: Arundel *v.* Arundel, 1 Ch. Rep. 90.]

(*b*) Marsdon *v.* Bound, 1 Vern. 332. In one case, even without any order, it seems to have been the main ground for admitting the evidence; Howard *v.* Tremaine, 4 Mod. 146; 1 Salk. 278; 1 Show. 363; Carth. 265. But Salkeld says that the defendant was in contempt, which is denied by Carthew.

(*c*) Piercy *v.* ——, Sir T. Jones, 164. This case is cited with approbation in 1 Stark. on Ev. 271.

(*d*) Cazenove *v.* Vaughan, 1 M. & S. 7. Of depositions ordered to be read on the trial of an issue, *vide infra*, P. III. ch. 5, § 3.

(*e*) *Vide supra*, p. 124.

(*f*) [Depositions *de bene esse*, taken in Equity, are good evidence at law, where the witness dies before answer; Howard *v.* Tremaine, 1 Salk. 278.]

(*g*) [See the Orders, *supra*, p. 256, n (*b*).]

(*h*) [*Vide infra.*]

admitted as secondary evidence. Thus were a party examined a witness after an order for publication, and afterward, being informed of the irregularity, obtained an order to re-examine him, but before that could be done, he died, the Lord Chancellor Parker allowed the depositions to be used, saying that the re-examination had been prevented by the act of God. (*a*)

Viva voce evidence on a former trial.

Evidence which has been given by the same witness in a former trial or suit between the same parties, or any under whom the present parties claim, and concerning the same matter, (*b*) is good secondary evidence. (*c*) If the evidence was delivered *vivâ voce* at a former trial, the person who undertakes to prove it must swear to the very words, not merely to their effect. (*d*) This could be done by no one better than by a short-handwriter; reading from his note book and swearing that he took down correctly what was said. Proof must be given that there was a regular cause pending, or else the former evidence appears like a mere voluntary affidavit. (*e*) The usual mode of showing this is the production of the verdict, but the *nisi prius* record with the *postea* indorsed has been held to be sufficient. (*f*)

[185]

Depositions in a former suit.

If the former evidence was taken in equity, it becomes equally admissible. (*g*) The office-copy of the depositions will

(*a*) [See also Arundel *v.* Arundel, *ut supra.*]

(*b*) As to the latitude with which this identity is to be understood, *vide infra*, P. III. ch. 1, § 3. (1). A Court of Equity, as will be there seen, looks more to the identity of the matter than of the parties; Debrox *v.* ——, 1 P. Wms. 415. See Tillotson *v.* Hargrave, 3 Mod. 494.

(*c*) Coker *v.* Farewell, 2 P. Wms. 563; Pike *v.* Crouch, 1 Ld. Raym. 730. The judgment of Lord C. J. De Grey, in the Duchess of Kingston's case is frequently referred to as laying down with great authority the rules of admissibility of such evidence as this; 11 How. St. Tr. 261. [The deposition of a witness before a coroner, and at the time of the trial of an action arising out of the same transaction beyond seas, was held to be admissible at law; Sills *v.* Brown, 9 C. & P. 601.]

(*d*) Lord Kenyon in Lloyd *v.* Donisthorne, cited in 1 Phill. on Ev. 219, and in R. *v.* Joliffe, 4 T. R. 290.

(*e*) Gilb. on Ev. 69; Bull. N. P. 240.

(*f*) Pitton *v.* Walter, 1 Show. 162.

(*g*) Coker *v.* Farewell, 2 P. Wms. 363; Fry *v.* Wood, 1 Atk. 445; R. *v.* Joliffe, 4 T. R. 290; and see a note, 1 Swanst. 170. [Of course, as secondary evidence, this is only as to the depositions of the witnesses already dead, &c.; see Carrington *v.* Carnock, 2 Sim. 569. And, as such, that examination in Chancery may be used before the delegates; see Gargrave *v.* ——, 2 Ch. Ca. 250. Examination in the Court of Admiralty used in the Court of Chancery; Watkins *v.* Fursland, Toth. 192. But in an old case it was decided that depositions taken in the Court of Council of York, were not admissible in Chancery; Rex *v.* Arundel Css. of, Hob. 112. And in general, depositions taken without bill or answer not available in Chancery; ibid.; see also Fielders *v.* Winchester Bp. of, 1 Barn. (K. B.) 323.]

be the proper proof, (*a*) and its literal correctness is taken for granted. Proof is equally requisite that a cause was properly pending; all the proceedings up to the examination must be proved, (even when it is so nearly the same cause as to be only the trial at law of one of the issues), unless an order has been obtained for them to be read, and then "the Court of law will read them upon that order without going through all the above mentioned course for the purpose of making them evidence." (*b*) It may be observed that the difference is material in one respect, besides the expense, namely that the answer thus proved becomes evidence and may be used by the adverse party. (*c*) Ancient depositions (up to about the year 1636) may be given in evidence without the bill or answer, because before that time the pleadings were not enrolled, but were left loose in the office with the clerks of the office, and were thereby subject to be lost. (*d*) It is essential that the party against whom the former evidence is to be read should have been a party, or privy to a party, in the former suit, for the obvious reason that otherwise he would have had no opportunity of cross-examining. (*e*) Yet the order has

(*a*) Except in an indictment for perjury, when the strictest evidence is required, and the examiners or commissioners or their clerk, must attend in person; Gilb. on Ev. 66; and see Anon. 3 Mod. 116. [And so to establish a case of forfeiture (by having filed a bill to establish a claim) the mere office copy of the bill without any evidence of the identity of the party, held insufficient evidence; and the Court even refused an inquiry; Williams *v.* Knight, 5 Beav. 273. As to office copies in general, *vide supra*.]

(*b*) Palmer *v.* Aylesbury Lord, 15 Ves. 176; Goodenough *v.* Alway, 2 S. & S. 482. [As to evidence at law on the trial of an issue directed by this Court, *vide infra*, p. 404, and Corbett *v.* Corbett, 1 Ves. & B. 335. But note when the depositions are ordered to be read in such a trial, it is to save expense and not as secondary evidence, for it is ordered whilst and as to witnesses living.]

(*c*) Bourne *v.* Whitmore, cited in Bull. N. P. 238.

(*d*) Blower *v.* Ketchmore, 2 Keb. 31; Gilb. on Ev. 65. [*Vide supra*, p. 150-1.]

(*e*) [Peterborough *v.* Norfolk, Pr. Ch. 212; Barstow *v.* Palmer, ibid. 233;] Rushworth *v.* Pembroke Css. of; Hardr. 472. [As the examination of a bankrupt cannot be read against any one who had no power or opportunity of cross-examining; *ex parte* Ansby, 2 Dea. & Ch. 212.] The opportunity [of cross-examination] though neglected is sufficient; Carrington *v.* Carnock, 2 Sim. 568. [Depositions in a suit, the witness being since dead, read in another suit against the same defendant as to the same matter; although by another of the tenants in common; Byrne *v.* Frere, 2 Moll. 20. Evidence with respect to a transaction between A. and B., taken on behalf of B., in a suit between B. and C., for the purpose of asserting against C. a right to property which B. claimed, by virtue of that transaction, cannot be used by D., in a suit to which B., C., and D. are parties, and in which D. sets up both against B. and C. an equitable interest in the property, co-temporaneous with and growing out of

been sometimes made when the party was different, but "saving just exceptions;" that is to say, the proof of the bill, answer, &c., has been dispensed with, while the admissibility of the evidence was left to be decided by the Court of law. (*a*) The Vice Chancellor (Sir J. Leach) refused the order for depositions taken between other parties in a cause in the
[186] Exchequer. (*b*) The refusal was repeated in a similar case shortly afterwards, apparently on the ground that the order is not absolutely obligatory upon the Court, and that it was useless because the case was one in which strict proof ought not to have been dispensed with. (*c*) It is said that one who was not a party to the former suit shall not use depositions against another who was a party, for that "this would create the greatest mischief that could be; for then a man who never was party to the Chancery proceedings might use against his adversary all the depositions that made against him, and the adversary could not use in his own advantage those that made for him; because not having been concerned in the suit he never had the liberty to cross-examine, and therefore cannot be encountered with any depositions out of the cause." (*d*) But probably a party using such evidence would be considered to have waived his right of objecting to his adversary's doing the same. (*e*) There are certainly instances of its being allowed in equity." (*f*) There is an assertion in an old case that it was "common when one legatee has brought his bill

the title alleged to have been acquired by B.; Humphreys *v.* Pensam, 1 Myl. & C. 581; see also Barstow *v.* Palmer, Pr. Ch. 233; Nevil *v.* Johnson, 2 Vern. 447; Ellenborough E. of, *v.* St. Germains, 3 Bro. P. C. 539. Evidence taken in the Court of Exchequer, may be used in a suit between the same parties in the Chancery of Ireland; Magrath *v.* Veitch, 1 Hog. 127.]

(*a*) Coke *v.* Fountain, 1 Vern. 413.

(*b*) Goodenough *v.* Alway, 2 S. & S. 481.

(*c*) Williams *v.* Broadhead, 1 Sim. 152. [On an issue out of Chancery between A. and B., held that depositions in a suit between B. and C. inadmissible; Atkins *v.* Humphreys, 1 M. & Rob. 523.]

(*d*) Gilb. on Ev. 63, citing Hardr. 472, [*et vide supra*, p. 259, n. (*e*).]

(*e*) [By an Order of 22nd May, 1661, Clarendon, C., "Where either party, plaintiff or defendant, obtaineth an order to use depositions of witnesses taken in another cause, the adverse party may likewise use the same without motion, unless he be, upon special reason showed to the Court by that party first desiring the same, inhibited by the order so to do;" Sand. Ord. 304.]

(*f*) Terwit *v.* Gresham, 1 Ch. Ca. 73, and cases cited there. And see Freeman *v.* Phillipps, 4 M. & S. 486. It was allowed in Bath E. of, *v.* Battersea, 5 Mod. 9, to a defendant who "sheltered himself under the former defendant's title."

against an executor and proved assets, and afterwards another legatee brings his bill, that he should have the benefit of the depositions in the former suit, though he was not a party to it." (*a*) It was allowed in a recent case before the Vice Chancellor. (*b*) It should however be observed that this last was a tithe suit, in which evidence of reputation would have been admissible. (*c*) Possibly the same principle governed the case of the *City of London* v. *Perkins*, which was carried from the Exchequer to the House of Lords. The bill had been filed to recover a tonnage duty, and the plaintiffs, the corporation, moved that the depositions of witnesses in two former causes instituted by themselves against other defendants [187] for recovering the same duty might be read. In the second cause leave had been given to read the evidence of a witness who had died since the first, and now several more being dead, but there being no proof of the fact, the Court refused the motion, (*d*) although the counsel undertook to supply the defect by affidavits. But on appeal to the House of Lords, it was declared "that the Court of Exchequer ought not to have refused to grant an order for the appellants to have liberty to read the depositions taken in the two former causes at the hearing of this cause, saving all just exceptions." Upon this evidence they proceeded to ground their decree. (*e*)

Where the former suit has been dismissed, a distinction has been taken with regard to the use of the depositions. If the

Where former suit was dismissed.

(*a*) Coke *v.* Fountain, 1 Vern. 413; [and see Askew *v.* Poulterers' Comp., 2 Ves. 89.]

(*b*) Carrington *v.* Cornock, 2 Sim. 569.

(*c*) [So in Ward *v.* Pomfret, 5 Sim. 475, also a tithe suit. And office copies of the depositions taken in a tithe suit in the Exchequer may be read in a similar suit in Chancery against another defendant making the same defence, although the witness be living; on the production of office copies of the bill and answer in the first suit, without any order of this Court for that purpose; Williams *v.* Broadhead, 1 Sim. 151.]

(*d*) The Court of Exchequer refused a similar order in Hereford Bp. of, *v.* Cooper, Bunb. 295; stating some points of practice there somewhat different from that of the Court of Chancery. [A will not allowed to be proved by the handwriting of witness without positive proof of his being dead; Bishop *v.* Burton, 2 Com. 614.]

(*e*) 3 B. P. C. 602. The same principle was recognised in Freeman *v.* Phillips, 4 M. & S. 486. [Where defendants have been introduced by amending the bill, the depositions already taken not available against them; Neblet *v.* Daniel, Bunb. 310; Quantock *v.* Bullen, 5 Mad. 81; (where also the defendants were infants and could not consent), and Pratt *v.* Barker, 1 Sim. 1. And see the principle extended *ex parte* Mascarenas *v.* Dacoron, 1 Dea. & Ch. 507.]

ground of dismissal was "that the matter of it was not proper for equity to decree, yet the facts proved may be used in evidence between the same parties whenever they shall come in question again; but when the cause was dismissed for irregularity, (as, coming by revivor when it should have come by original bill), so that in truth there was never regularly any such cause in the Court, and consequently no proofs, these proofs cannot be used. And so upon long debate and after several formal arguments it was ruled about Michalemas Term, 1699, by the Lord Keeper." (*a*) But the first of these two propositions cannot be taken so broadly as it is here stated, or else a sham suit would have long since become a common method of obtaining interrogatories *de bene esse* when it could not be done in the regular way. In two instances however they were admitted as trials by C. J. Holt, after the dismissal of the bills; the circumstances are not reported. (*b*)

[188]

Depositions taken at common law,

Depositions taken *de bene esse* by order of a Court of law under the stat. 1 W. 4, c. 22, or before that statute, by consent of the parties, have been already mentioned. (*c*) Examinations before justices or coroners in criminal matters can so rarely become in any way available in Courts of equity that it will be sufficient to refer to the statutes, 7 G. 4, c. 64, and, before that act was passed, 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10. (*d*)

taken in Ecclesiastical Courts.

Depositions taken in an ecclesiastical suit upon a matter over which the Court had jurisdiction, would probably be admitted. So it appears on principle, and so appears to be the better opinion in the books of authority on the subject. (*e*) There is a want of modern authorities: indeed, it is a question that could rarely arise, because, as has been observed before with regard to depositions taken *de bene esse* by order of a

(*a*) Backhouse *v.* Middleton, 1 Ch. Ca. 175.

(*b*) Smith *v.* Veale, Ld. Raym. 735, and a case cited there.

(*c*) *Vide supra*, p. 194.

(*d*) See 1 Phill. on Ev. 367. [The depositions taken before magistrates are the best and only proper evidence of the statements made, and the rule applies to them in all proceedings connected therewith in which it is sought to adduce the statements in evidence; Leach *v.* Simpson and Another, 7 Dowl. 513.]

(*e*) Gilb. on Ev. 67; 1 Phill. on Ev. 378; 1 Stark. on Ev. 269. *Contrà*, Bull. N. P. 242.

Court of law, (*a*) it would be useless to offer them if they were in the slightest respect objectionable, the Court in which they are taken having no control over the suitors in equity to compel them to waive objections. (*b*)

taken in bankruptcy, &c.

There are some instances in which Depositions, as well as other kinds of secondary evidence are made admissible by act of Parliament. Those taken before commissioners of bankruptcy are ordered to be received under certain restrictions, (*c*) even though it is an *ex parte* proceeding. (*d*)

Handwriting when admitted as secondary evidence.

Inferences therefrom.

The fact that a signature, letter, &c., was or was not written by a certain individual, may be proved by evidence of the handwriting, if neither himself nor any one who actually saw it written can be produced. (*e*) And every inference which by law is necessarily attached to the act of writing under the circumstances of each particular case, is proved, incidentally, by proof of the hand. For instance, from a person's signature in the attestation to a deed it is inferred that he really saw it sealed,

(*a*) *Supra*, p. 124.

(*b*) [That is to say, it is not like the case of depositions in equity read at law by order of the Court of Equity, *ut supra*.]

(*c*) Stat. 6 Geo. 4, c. 16, s. 92, and the earlier statutes on the same subject which were successively passed and repealed; [*vide supra*, p. 259, n. (*e*); *ex parte* Arnsby, 2 Dea. & Ch. 212.]

(*d*) [Although a person may have been improperly examined before commissioners of bankruptcy, upon a subject unconnected with the interest of the bankrupt's estate, with a view to procure evidence in an action depending against him, the examination may be used as evidence by the plaintiff at the trial of the action; and the Judge at Nisi Prius cannot inquire into the abuse of the authority of the Great Seal, by which the examination has been obtained. The remedy of the party so improperly examined, is by an application to the Chancellor to have the examination taken off the file and cancelled; Stackfleth *v.* De Tastet, 4 Camp. 10.]

(*e*) [One subscribing witness dead, and another out of the jurisdiction, proof of handwriting allowed; Banks *v.* Farquharson, Dick. 167. Proof of the handwriting of an attesting witness, abroad at the time; held admissible at law, notwithstanding the power under 1 Wm. 4, c. 22, s. 4; Glubb *v.* Edwards, 2 Moo. & R. 301. So where the father of the witness proved his having enlisted in a regiment, which upon inquiry at the War Office, he was told had sailed for India; held sufficient to let in proof of his handwriting; Wyatt *v.* Bateman, 7 C. & P. 586. Mortgage having been bequeathed to the wife of subscribing witness, whereby he became an incompetent witness, proof of his handwriting held sufficient proof of the execution of the mortgage as between mortgagor and mortgagee; Niman *v.* Parsons, 4 Mad. 171. Witness to a bond became executor to the obligee; in an action brought by him on the bond, he being surviving witness, and by the facts incompetent, evidence of his handwriting admitted; Goss *v.* Tracey, 1 P. Wms. 289.

Under particular circumstances, proof of the handwriting of an attesting witness to a will admitted as evidence in order to found a decree establishing the will, in James *v.* Parnell, Turn. & R. 417.

Where an attesting witness to a will after the decease became interested, yet his evidence was admitted in Brograve *v.* Wonder, 2 Ves. jun. 634.]

[189] signed, and delivered (*a*); from a written copy of a libel it is inferred that the copier assisted in publishing it; from a letter it is inferred that the contents are true, as far as they clash with the interest of the writer. For the proof of this act of writing, the presence of the best witness is dispensed with more readily than for the proof of any other fact; perhaps too readily, considering how frail and uncertain is the substitute. (*b*) The reason assigned has been that the evidence in question is in fact scarcely secondary;—perhaps it would be more correct to say that the testimony of the writer himself is often no better than secondary, for in a great number of instances, having no distinct recollection of the act, he merely acknowledges or disclaims the handwriting, which might have been done equally well by a person who had been in the habit of corresponding with him or seeing him write. It is partly on this ground that even in a prosecution for the forgery of a bank note, the attendance of the cashier of the bank is not insisted upon; (*c*) for it would be absurd to expect that he could remember each individual signature, when very likely he has signed his name mechanically several hundred times in a day. (*d*) The case in which proof of handwriting was first allowed when it was known in what foreign country the witness was residing was one before Lord Mansfield; (*e*) Lord Kenyon says this rule was received with approbation at the time, on account of the convenience of the case; he adds that the old rule was to send out a commission to examine the witness; he had himself adopted the new rule. (*f*) That case did not set the point at

Proof of handwriting;

(*a*) [When the attestation of a deed was in the usual form, and the attesting witness recollected seeing the party sign the deed, but did not recollect any other form having been gone through, at law it was held to be for the jury to say, on his evidence, whether the deed was not duly signed, sealed, and delivered; as all that is very likely to have occurred, though the witness did not remember it; Burling *v.* Paterson, 9 C. & P. 570]

(*b*) In some instances however, where the attendance of the witness himself is very important, the Courts are proportionably strict; *vide supra*, p. 252, n. (*c*).

(*c*) [We have adverted to the fact that copies of the books of the Bank of England are admissible in evidence; but upon a question whether a particular signature to a transfer was the genuine handwriting, for obvious reasons, the original must be produced; Auriol *v.* Smith, 18 Ves. 198, *et vide supra*, p. 166, n. (*c*).]

(*d*) A late secretary to the Admiralty stated that he had once signed his name six thousand times in a day. Bankers sign warrants for dividends in even greater numbers.

(*e*) Coghlan *v.* Williamson, Dougl. 93. [*Et vide supra*, p. 251, n. (*g*).]

(*f*) Barnes *v.* Trompowsky, 7 T. R. 265; Prince *v.* Blackburne, 2 East,

rest, for in a few years afterwards it was thought right to make it to a certain extent indisputable by inserting in an act for the regulation of trials in India, and for other purposes, a clause [190] that the execution and attestation in India of bonds or deeds or other writings might be proved by evidence of the handwriting of the obligors or party and of the witnesses, and that they were resident in the East Indies. (*a*)

what sufficient,

The foundation which the witness must have for his belief that the handwriting is that of the person to whom he attributes it, has always been a debatable ground. In old times it was necessary that he should have actually seen him write: (*b*) even once was enough. (*c*) But in *Lord Ferrers* v. *Shirley* (*d*) it was held that a witness might swear to handwriting where there had been a fixed correspondence by letters, and proof could be given of identity. (*e*) Lord Kenyon declared his approbation of the rule so laid down, (*f*) and it has since been taken as clear law. (*g*) But where there is a reasonable possibility that the specimens on which the witness grounds his belief were also forgeries, the evidence is rejected; as where the inspector of franks at the Post Office, called to prove the signature of a

250; [and see Glubb v. Edwards, 2 Mood. & R. 301, cited fully above.] But see, with respect to the old rule, the dictum of Page, J., in Lord Ferrers v. Shirley, Fitzg. 196.

(*a*) Stat. 26 Geo. 3, c. 57, § 37. [The witness gone to the East Indies; see Wyatt v. Bateman, p. 263, n. (*e*), *supra*.

In the Ecclesiastical Courts also the handwriting and character of a living witness, who was resident in an enemy's country, admitted to proof, in Miller v. Sheppard, 2 Lees. R. 520, which case may serve to point out *when* Lord Mansfield's rule becomes necessary as well as merely convenient.

Practice in a suit in equity to prove a will, when one of the witnesses is abroad, see Hare v. Hare, 5 Beav. 629.]

(*b*) [And he must swear to his belief that the writing produced is the handwriting of the person. The witness merely swearing that he *thinks* it like is no evidence; Eagleton v. Kingston, 8 Ves. 473, S. C. 476.]

(*c*) Garrells v. Alexander, 4 Esp. 37, and the cases cited there. [Where the evidence of handwriting to an acceptance was of a banker's clerk, who only once saw the party sign his name in the book, and thought the one in question the same, and that cheques similarly signed had passed through the house, it was held evidence to go to the jury; Warren v. Anderson, 8 Sc. 384.]

(*d*) Fitzg. 196.

(*e*) [A curious case of disputed handwriting, and difference of opinion on it, was Smith v. Ferrers L., tried at the Spring Assizes, Feb. 1846. An action of breach of promise of marriage; the case was published shortly afterwards. The handwriting of the letters was the main difficulty. But note, proof of handwriting may be and often is more than secondary evidence.]

(*f*) Carey v. Pitt, Peake on Ev. App. 176.

(*g*) Thorpe v. Gisburn, 2 C. & P. 21; Harrington v. Fry, 1 Ry. & M. 90. [And as to the evidence necessary to prove handwriting, see also Randolph v. Gordon, 5 Pri. 312.]

Member of Parliament, could only speak from the superscriptions of letters purporting to have been signed by him. (*a*)

what not.

The Courts, feeling probably that the whole of this is very uncertain ground, have been scrupulous about admitting opinions formed in any other way than from actual knowledge of the characters. The above mentioned inspector of franks was not allowed to say whether in his opinion the signature before him was a forgery, he having been in the habit of detecting forgeries. (*b*) But carelessness in the use of capital letters was admitted as a reason for discrediting a writing attributed to a well educated man, (*c*) and bad spelling would probably be almost conclusive. (*d*)

[191]

Comparison of writing.

The readiest and most satisfactory way of ascertaining handwriting would appear to be a close comparison of that in question with undoubted specimens (*e*); but, for various reasons, which are ably discussed by Mr. Starkie, (*f*) the Courts have made a rule against the admission of such evidence. It has however on several occasions been more or less relaxed, (*g*) and lately it has been as nearly as possible broken through altogether. (*h*) Mr. Justice Park allowed the defendant's attorney to observe carefully a signature to an affidavit signed by the plaintiff, and then to swear that he had formed such a knowledge of his

(*a*) Carey *v.* Pitt, Peake on Ev. App. 176.

(*b*) And see Gurney *v.* Longlands, 5 B. & A. 330; it was there treated by the K. B. as a trifling question, and doubtful evidence, although it had sometimes been allowed.

(*c*) Erskine *arg.* in Da Costa *v.* Pym, Peake on Ev. App. 177.

(*d*) [*Sed vide infra.*]

(*e*) [For use made of inspection and comparison of handwriting, with a view to decide as to the genuineness of certain orders entered in the register, see certificate of Sir Dudley Digges, M. R., 12 Car. 1, 1636-7; Sand. Ord. 192.]

(*f*) 2 Stark. on Ev. 375; [3rd ed. 515, *et seq.*]

(*g*) In ancient times a deed might receive credit "*per collationem sigillorum, scripturæ,*" &c. Co. Litt. 6 *b*; in Morewood *v* Wood, 14 East, 328. The signature of the foreman of the homage was proved by being found "to tally" with the signature to his will. See also Le Blanc, J., in Brune *v.* Rawlins, 7 East, 282 (note); Taylor *v.* Cooke, 8 Pri. 653; Revett *v.* Braham, 4 T. R. 498; Solita *v.* Yaror, 2 Mood. & M. 133. [And where a party called to prove the handwriting of an attesting witness, denied that it was his, and on being shown another paper (not in the cause) he also negatived that; held, that it was not competent to prove that the latter was actually the handwriting of the attesting witness, for the purpose of contradicting the witness; Hughes *v.* Rogers, 8 Mees. & W. 123; and see Doe *v.* Newton, 5 Ad. & El. 514, and 1 Nev. & P. 1; Doe *v.* Sucklemore, 5 Ad. & El. 703 and 2 Nev. & P. 16; Griffiths *v.* Ivory, 3 Per. & D. 179, 11 Ad. & El. 322. What is evidence of writing sufficient to go before a jury; see Warren *v.* Anderson, 8 Sc. 384, *supra*, 190 (*t*).]

(*h*) [The subject of comparison of handwriting by way of evidence is treated of more fully in Smith's Leading Cases.]

handwriting as would enable him to swear to his signature to another document. (*a*) Mr. Baron Gurney after consultation with Mr. Justice Alderson allowed signatures indisputably genuine, and spelled differently, to be submitted to the jury for the purpose of comparison with the signature in question. (*b*) The cross of a marksman may be sworn to if there be any peculiarity in it. (*c*)

(*a*) Smith *v.* Sainsbury, 5 Carr. & P. 196.

(*b*) Anon. 1833, cited in 2 Stark. on Ev. 1034. [Upon an issue at law whether an indorsement was the handwriting of the defendant; held that the jury could not be allowed to compare with other writings in general that in dispute; they could only do so with documents which are otherwise in the cause; Bromage *v.* Rice, 7 C. & P. 548. Where letters were put in bearing different dates; held, that others, part of the same correspondence, sent in the interval, could not be received, unless expressly referred to in those which were put in; Sturge *v.* Buchanan, 2 M. & Rob. (N. P.) 90. On an issue whether an acceptance was not that of the defendant; held that letters written by him, and relating to the transaction, and which had been received in evidence, might be handed to the jury; Eaton *v.* Jervis, 8 C. & P. 273. The handwriting of a clergyman, viz. rector of a parish, his signature in register book (the entries whereof it was his duty to sign) held sufficient evidence of his handwriting to a receipt; Taylor *v.* Cook, 8 Price, 650. Comparison of handwriting, although recently admitted, as evidence thereof, when confirmed by the contents of a whole correspondence, refused when one letter only, and a case of commitment; Wade *v.* Boughton, 2 V. & B. 172. As to comparison of handwriting, see also Waddington *v.* Cousins, 7 C. & P. 595. On a claim of peerage, a family pedigree, from the proper custody, was produced and offered in evidence, and in order to prove the handwriting, the opinion of an inspector of franks and official correspondence (forming a judgment of the character of handwriting from inspection of other documents, without immediate comparison with the one in question) was rejected; but that of the claimant's family solicitor (who had acquired a familiar knowledge of the ancestor's handwriting, from having, in a long course of his business, for the claimant's family, examined deeds, &c., signed by the ancestor and coming to the claimant as muniments of his title to estates descended to him) was received; Fitzwalter peerage, 10 Cl. & Fi. (P.) 193. Evidence of handwriting of a person deceased tested by comparison with the signature of his will, in Davies dem. Lowndes, ten. 7 Scott, N. R. 141. As in Morewood *v.* Wood, 14 East, 328, *vide supra*, p. 266, n. (*g*). But where the signature of a retainer, upon which the attorney for the defendant had acted, was offered as evidence of the defendant, (by comparison of handwriting,) it was rejected as no evidence; Drew *v.* Prior, 5 Man. & Gr. 264. Proceedings to prove handwriting, where a witness disbelieves the genuineness, and assigns, as reason, the want of certain peculiarities; see Young *v.* Honnor, 1 Car. & K. 51, 2 M. & Rob. 536. As to this subject generally, see Stark. on Evidence, Digest of Proofs, title, Handwriting, 3rd ed. vol. 2, p. 512.

In the Ecclesiastical Courts it was always the rule, that similitude of handwriting, even with a probable disposition, was not sufficient to entitle a paper to probate without something to connect it with the deceased; Rutherford *v.* Maule, 4 Hagg. R. 224.]

(*c*) George *v.* Surrey, 1 Mood. & M. 516. [The Courts of Law will even avail themselves of the superior power of vision acquired by some men, in the following of particular callings. On an indictment for forging a will, written apparently over pencil writing previously rubbed out, the evidence of an engraver, in the habit of looking at minute lines on paper, was held admissible as to the existence of such pencil marks, which he had examined with a microscope; R. *v.* Williams, 8 C. & P. 434. So in the case of the Huntingdon peerage, the Att. Gen. availed himself, for his own greater satisfaction, of a magnifying glass, to detect any appearance of erasures, &c. in any of the registers.]

II. When the best evidence would be documentary.

Secondly, when the best evidence is documentary, it must either be proved that the whole or a part of it cannot possibly be produced, (*a*) or it must be shown that the whole or apart of it is unintelligible and useless, (*b*) before any kind of secondary evidence can be received. (*c*)

[192]

The former is the consequence either of its destruction, or its loss, or its detention in the hands of the adverse party or the witness. (*d*)

Where the document cannot be produced;

The actual distinction of a document, whether it was witnessed by persons present, or is to be inferred from circumstances,

(*a*) [As in the instances referred to above, p. 149, n. (*c*), so in the case of a will, the original having been proved and deposited abroad; see Pullan *v.* Rawlins, 4 Beav. 142, and the earlier cases there cited, and a lost will, see the Fitzwalter Peerage Case, 10 Cl. & Fin. 946.]

(*b*) [The secondary evidence of which use may be made, in certain cases where a document, though still perfect, yet by itself would be unintelligible is that more properly designated as extrinsic; of such we shall treat bye and-bye.]

(*c*) [There are, it would seem, no degrees of secondary evidence; but where a party is entitled to give secondary evidence at all, he may give any species within his power; *e. g.* a lost deed may be proved by parol, although an attested copy exists; Doe *v.* Ross, 8 Dowl. 389, and S. C. 7 M. & W. 102. Nevertheless, although secondary, yet it must be good evidence. So that the non-production of an original document, although letting in proper secondary evidence, does not open the door to any loose secondary evidence, such as a paper purporting to be only substantially a copy of the original; Everingham *v.* Roundell, 2 M. & R. 138; see also Doe *v.* Williams, 1 Carr. & M. 615.] Lord Coke has a passage respecting the proof of deeds pleaded at law, which set forth very pointedly the necessity of strictly requiring the originals. It will be found *infra*, P. III. c. 2. After the lines there quoted he continues, "And therefore it appears that it is dangerous to suffer any, who by the law in pleading ought to show the deed itself to the Court, upon the general issue, to prove in evidence to a jury by witnesses that there was such a deed, which they have heard and read; or to prove it by a copy; for the viciousness, razures, or interlineations, or other imperfections in these cases, will not appear to the Court; or peradventure the deed may be upon condition, limitation, with power of revocation, and by this way truth and justice, and the true reason of the common law would be subverted. But yet in great and notorious extremities, as by casualty of fire, that all his evidences were burnt in his house, there if that should appear to the Judges, they may in favour of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses, that affliction be not added to affliction;" 10 Rep. 92, *b*. [Evidence may be given at law of a lost deed; but not of a lost bond; for of that a *profert in curia* must be made; Snellgrove *v.* Bailey, 3 Atk. 214. But as to the use, in the Courts of India, of secondary evidence of the contents of a bond destroyed; see Syud Abbas Ali Khan *v.* Yadeum Ramy Reddy, 3 Moore, I. A. 156. It may be useful to know that where the parochial registers are lost the copies, filed in the Bishop's Registry, prior to 55 Geo. 3, c. 146, ss. 6, 7, are admitted; and such returns, in such cases, are admitted *quasi* secondary evidence; but semble, such returns might be used as original and primary evidence, when they could be themselves produced; and, as public documents, like the registers themselves, copies of them even might be admissible; Walker *v.* Beauchamp, 6 C. & P. 552. When secondary evidence of the contents of a deed may be given, see Parkhurst *v.* Lowton, 2 Swan. 213, 4.]

(*d*) [Or some other party not amenable to the jurisdiction, as in Pullan *v.* Rawlins and Newton *v.* Cordell, cited *supra*, n. (*a*).]

may be proved in equity by affidavits; (*a*) but if the destruction was casual, the proof is the same as at law. (*b*) Where the document has been wilfully destroyed, the Court of Equity will admit slighter evidence, for every thing will be presumed in *odium spoliatoris*. (*c*) Sometimes it is admitted in the answer; (*d*) but where that is not the case, preliminary proof must be given that the document once existed; for even when a person had been seen destroying several deeds, the Court could not be brought to presume that an indenture was among them of which it was only strongly suspected that it had ever actually existed. (*e*)

in consequence of its destruction;

When the loss of a document is to be proved, the point is, to satisfy the Court that a sufficiently careful search has been made without success. (*f*) Sometimes circumstances can be added, as that the room in which the deeds were kept had been broken open by thieves, and some of them thrown about and destroyed. (*g*) It was shown in the Leigh Peerage case, that the chapel in which the supposed monument was said to

[193]

or loss;

(*a*) Askew *v.* Poulters' Co. 2 Ves. 90; Cole *v.* Gibson, 1 Ves. 505.

(*b*) Cookes *v.* Hellier, 1 Ves. 235.

(*c*) R. & Hunsdon *v.* Arundel, Hob. 111; Dalston *v.* Coatsworth, 1 P. Wms. 731; and the cases there cited; Saltern *v.* Melhuish, Ambl. 247. [Delaneg *v.* Harrison, 2 Bro. P. C. 659, and see Childrens *v.* Saxby, 1 Vern. 207.]

(*d*) [Advantage of admission in the answer, for letting in secondary evidence, see the cases Whitfield *v.* Fausett, 1 Ves. Sen. 387, and Crosse *v.* Bedingfield, 12 Sim. 35.]

(*e*) Cowper *v.* Cowper, 2 P. Wms. 746. Fires have several times occurred which have destroyed public documents. One at the Rolls in 1618 destroyed many bills and answers; see Blower *v.* Ketchmore, 2 Keb. 31. [See an order of 5 Car. 1, 1629. To enrol letters patent, the privy seal having been burnt at the fire in the Six Clerks Office; Sand. Ord. 1617.] The great fire in 1666 destroyed the wills in the Archdeacon's Court; see 1 Ld. Raym. 732; not to mention others.

(*f*) R. *v.* Morton, 4 M. & S. 48; and see Bligh *v.* Wellesley, 2 Car. & P. 400. [What is sufficient diligence in search to let in secondary evidence on assumption of loss of a document in general, see Fitz *v.* Rabbitts, 2 M. & R. 60. Of loss of warrant, see Minshull *v.* Lloyd, 2 Mees. & W. 450. Of a cheque, see Mc Gahey *v.* Alston, 2 Mees. & W. 212. As to a will, Fitzwalter Peerage Case, 10 Cl. & Fin. 946. A deed of settlement, ibid. and Holcroft Lady, *v.* Smith, 2 Freem. 259. A lease, Doe d Egremont E. of, *v.* Pulman, 3 Ad. & Ell. N. S. 622; and generally as to any document every reasonable, though not every possible search is to be made; Hart *v.* Hart, 1 Hare, 1. At law also where not sufficient evidence of diligent search, secondary evidence not admitted; Thompson *v.* Travis, 8 Sc. 85; Williams *v.* Wilcox, 8 Ad. & Ell. 314. The following cases may also be consulted as to this subject and the diligence to be used; Whitfield *v.* Fausset, 1 Ves. 389, and Pardoe *v.* Price, 13 Mee. & W. 267; S. C. 14 Law J. 212; Walker *v.* Beauchamp, 6 C. & P. 552; Brindley *v.* Woodhouse, 1 Carr. & K. 647; Reg. *v.* Kenilworth, Carr. H. & A. 66, and S. C. 14 Law J., N. S. 160; 9 Jur. 898, at law.]

(*g*) Stokoe *v.* Robson, 3 V. & B. 51; Smith *v.* Bicknell, ibid. note.

have existed had undergone alterations. So when a paper had become useless as far as regarded its original purpose, or was of a kind which the person in whose custody it had been was in the habit of throwing aside and destroying as useless papers. (*a*) In cases of this description slight proof of search is necessary; "The degree of trouble to be taken depends upon the nature of the instrument: If it be of value, or of such a nature that the reasonable presumption is that it is in existence, stricter evidence is required in order to show that it is destroyed or lost: If it be an instrument of no value, then the reasonable presumption being that it *has* been destroyed or lost, slight evidence only of its destruction or loss is required." (*b*) A person into whose hands a document has been traced, ought to be examined before it can be decidedly pronounced to be lost even although he has denied all knowledge of it; (*c*) if he is dead, the evidence of his personal representative on the point becomes necessary. (*d*) But where the same information which traced a deed into the hands of a person since deceased, proceeded to say that he had burnt it, it was held, at law, unnecessary, to examine his executrix. (*e*)

What evidence admitted as secondary.

If an original deed be lost, as Lord Hardwicke said, [and therefore if destroyed] the counterpart may be read; (*f*) and if there is no counterpart forthcoming, then a copy may be admitted; (*g*) and even if there should be no copy, there may be parol evidence of the deed and the manner of its being lost. (*h*) A claim under a lost deed was allowed on the pro-

[194]

(*a*) Freeman *v.* Arkell, 2 B. & C. 494.

(*b*) Best, J., in Freeman *v.* Arkell, 2 B. & C. 494; and see R. *v.* Johnson, J., 7 East, 66; Kensington *v.* Inglis, 8 East, 278, 288; Brewster *v.* Sewill, 3 B. & A. 296.

(*c*) R. *v.* Castleton, 6 T. R. 236.

(*d*) Williams *v.* Younghusband, 1 Stark. Rep. 139.

(*e*) R. *v.* Morton, 4 M. & S. 48.

(*f*) [As in Donegal M. of, *v.* Salt, 8 Bli. N. S. 854. Where a libel (a song) from which the publication took place was lost, and the printer produced a similar one printed at the time, which was proved to correspond with that lost, held sufficient; Johnson *v.* Hudson, 7 Ad. & Ell. (Q. B.) 233, n.]

(*g*) [*Vide supra*, p. 247, n. (*b*), that at law no gradations of secondary evidence are recognised.]

(*h*) In Villiers *v.* Villiers, 2 Atk. 72; [and see Combes *v.* Spencer, 2 Vern. 471; S. C. ibid. 591. As to the production of a paper purporting to be an attested copy having weight, see Ward *v.* Garnons, 17 Ves. 140; *contrà*, see Brindley *v.* Woodhouse, 1 Carr. & K. 647. That parol evidence may be offered of a deed destroyed, lost, or kept by the other party, even though attested copies existed, see Doe d. Gilbert *v.* Ross, 7 Mees. & W. 102.]

duction of an authenticated copy of it, coupled with its being recited and recognised in other deeds and instruments, and its being memorialized in the register for the West Riding of Yorkshire, (where the lands were situate,) and the long acquiescence of parties interested in disputing the claim. (*a*) And in another case, the drafts, together with a statement in an abstract of the title, and the existence of the lease for a year of other estates appearing to have been included in the same plan of settlement, were held sufficient to prove a lease and release. (*b*) But in an earlier case a recital of a deed executed in 1739, that by a separate deed in 1703, A. declared he was seised of the freehold lands in trust for B., to whom he had on the same day granted a lease of the same lands for 1000 years, was held not to be sufficient evidence of the contents of the deed declaring the trusts; neither was the receipt of a Master acknowledging such deed to have been lodged with him, evidence of its contents though it might be of its existence. (*c*)

(*a*) Tunstall *v.* Trappes, 3 Sim. 308; and see Skipwith *v.* Shirley, 11 Ves. 64. [And where an assignment had been lost, before it had been entered of record, pursuant to the 6 Geo. 4, c. 16, s. 96; held that secondary evidence of it was admissible; Giles *v.* Smith, 1 Cr., M. & R. 462, and S. C. 5 Tyrw. 15.]

(*b*) Ward *v.* Garnons, 17 Ves. 134, and see the case; see also Worts *v.* Pern, 3 B. P. C. 548. [Attested copy of an abstract, or even the abstract of a deed, not even secondary evidence of it. Peterborough, E. of, *v.* St. Germaine, 3 B. P. C. 539. And yet see Doe *v.* Wainwright, 1 Nev. & P. 8, and S. C. 5 Ad. & Ell. 520. A draft of articles of partnership together with a stated account, and the payment of money, by the acting partner to the others; held sufficient evidence of partnership to ground decree for an account; Worts *v.* Pern, 3 B. P. C. 548. The defendants producing the lease for a year, and a copy only of the release, the original not being forthcoming, the bill was retained, with liberty to bring an ejectment, and in default to be dismissed with costs; Snell *v.* Silcock, 5 Ves. 469. As to this, *vide supra*, p. 241, n. (*c*).]

(*c*) Kelly *v.* Power, 2 B. & B. 236. [A bond for the performance of articles, though cancelled, was made an exhibit, and allowed as evidence to prove the execution of the articles, the limitation being inserted and recited in the condition of the bond; Anon. Gilb. Eq. Rep. 183. Decree for raising money under a deed of appointment, although the only copy produced, appeared unexecuted; upon recitals of it in two settlements as a subsisting effectual deed, and evidence, from books of a solicitor deceased, of charges for the preparation and execution of it; Skipwith *v.* Shirley, 11 Ves. 64. A recital in a deed between the plaintiff and defendant, as to the title to land adjoining premises of each, was held to be evidence against the plaintiff, but not to operate as an estoppel, and evidence therefore admissible to explain it; Carpenter *v.* Butter, 8 Mees. & W. 209. A mere recital of a surrender in the record of an admittance to a copyhold in the Record Book of the Manor (no surrender or record of any to be found) was held to be admissible evidence of such surrender in Rex *v.* Thurcross, 1 Ad. & Ell. 3; and 3 Nev. & M. 268; and as to the evidence afforded by recitals see Bingloe *v.* Goodson, 5 Bing. N. C. 738, S. C. 8 Sc. 71. Where the surrender of a copyhold was by power of attorney; held that the

Mr. Baron Wood, on proof that a will of lands had been lost, received parol evidence of its contents from a witness who had heard it read over before the testator's family on the day of his funeral. (*a*) But a probate could not be used for that purpose, being (as to the real estate) neither an exemplification, nor an office copy, nor a sworn copy. (*b*)

In the case of either loss or destruction, the Court will often direct a reference to the Master to inquire minutely into the facts. (*c*)

Proof that the original was valid.

[194]

And in either case the Court ought to be satisfied that the document was itself unexceptionable, (if a deed, that it was duly executed, (*d*)—if a note of hand, that it was genuine, &c.,) before the secondary evidence will be admitted. (*e*) The due execution of a missing deed should be proved, if possible, in the regular way, by the attesting witnesses. (*f*) And if two or

Court roll, stating it to be by power of attorney was secondary evidence of the power of attorney, if it could not be found; Doe *v.* Caperton, 9 C. & P. 115.]

(*a*) Anon. 2 Camp. 390, note. [In a case at law where by reason of the refusal of a witness to produce a deed, secondary evidence of its contracts was held to be admissible, yet the statement of its contents, by one who had been junior counsel on a previous trial, held not receivable as such secondary evidence, against one who was no party to that trial; Doe d. Gilbert *v.* Ross, 7 Mees. & W. 102. A will being proved and deposited abroad a copy admissible in evidence; Pullan *v.* Rawlins, 4 Beav. 142. And a copy of a will produced from the Prerogative Office was received in evidence, after proof of unsuccessful searches for the original, and that the practice in the office, at the time of the date of the will, was to give out the original will after taking copies; Fitzwalter Peerage, 10 Cl. & Fin. 946. A merchant's letter book, when available as secondary evidence against himself of the contents of letters copied therein; see Sturge *v.* Buchanan, 2 Per. & D. 573. A machine copy of a letter was admitted at law, as secondary evidence, the witness himself having struck it, in Simpson *v.* Thoreton, 2 M. & Rob. 433, Maule, J.]

(*b*) Doe d. Ash *v.* Calvert, 2 Camp. 389. [Unless indeed the defendant admitted it by his answer, and that fully; see Mullins *v.* Pratt, Bun. 6; not if he only admit his belief that there is such a will. When an original will is deposited abroad as to secondary evidence, *vide supra*, p. 149, n. (*c*); cases, 4 Beav. 144; *vide etiam* Bain *v.* Laschor, 11 Sim. 397; and see, as to lost will, Arthur *v.* Arthur, 3 B. P. C. 568.]

(*c*) [As in Hart *v.* Hart, 1 Hare 1.]

(*d*) [Deed lost, witness deposes that he saw the deed not sufficient, he must swear he saw it sealed and delivered; Cary, 31; see also Benson *v.* Olive, 1 Barn. K. B. 348.]

(*e*) See 1 Phil. on Ev. 433, 452; Goodier *v.* Lake, 1 Atk. 446. [When there was strong, although but circumstantial, evidence to show that the original trust deed was not stamped, the Court refused to admit secondary evidence to prove the trust; Prose *v.* Clarke, 1 Yo. & C. 534. But unless there be any evidence to the contrary, the lost instrument will be presumed to have been properly stamped; this was decided by V. C. Knight Bruce, after considering the cases, in Hart *v.* Hart, 1 Hare, 1.]

(*f*) *Ut supra*, p. 176. [When an equitable mortgagee gave a schedule of the deeds deposited with him, and described one as executed by, &c.; in ejectment by the mortgagee against a party in under the mortgagor, it was

more parts of a deed have been executed, they ought all to be accounted for. (*a*)

In consequence of detention by the other party,

It has been mentioned that in the generality of cases, when a document has been admitted by the answer to be in the possession of the defendant, a motion of course may be made to compel him to produce it, and notice must be given to him to that effect. (*b*) It has been also mentioned that the Court will either enforce its production by the regular compulsory process, or by a committal, or, if it should equally answer the purpose of the plaintiff, will admit secondary evidence. (*c*) In those excepted cases where the production of a document which has been admitted will not be enforced, or those cases in which it has been traced by other evidence into the party's possession, a notice must be given to him to produce it, (*d*) and on his refusal

notice to produce,

held, that the subscribing witness ought to be called; Doe *v.* Penfold, 8 C. & P. 536. Where secondary evidence by proof of the copy of an original deed not produced, is admitted, it is unnecessary to call the attesting witness, although the original appears to have been subscribed by one; Poole *v.* Warren, 3 Nev. & G. 693; and see also Doe *v.* Wainewright, 1 Nev. & P. 8, and 5 Ad. & El. 520, where attesting witness was dispensed with.]

(*a*) R. *v.* Castleton, 6 T. R. 236.

(*b*) *Vide supra*, p. 30, *et seq.*; [and that less evidence is ordinarily sufficient where the adversary occasions a defect in proof; see Retemeyer *v.* Obermuller, 2 Moore, 93.]

(*c*) *Vide supra*, p. 46; [and see Dan. Pr. Ch. by H. 839.]

(*d*) So at common law R. *v.* Watson, 2 T. R. 201; Atty. Gen. *v.* Le Merchant, Ib. note. *Vide sup.* p. 172-3.

[But the Court of Chancery will not receive secondary evidence of an instrument without notice to produce, upon the mere proof of its being in the possession of the opposite party; Knight *v.* Waterford, M. of, 4 Yo. & C. 284. And at law a general notice to produce all deeds relating to the matter in dispute, held sufficient to let in, as secondary evidence, (copy of) a particular letter, although not specified as to date; Jacob *v.* Lee, 2 Moo. & R. 33.

When enough is stated in the notice to produce, to leave no doubt but that the party must be aware of the particular instrument intended to be called for, it was held, at law, to be sufficient to let in secondary evidence; Rogers *v.* Constance, 2 Moo. & R. 179.

What is sufficient notice to produce to let in secondary evidence, in case of default, at law; see also the cases Morris *v.* Hauser, Ib. 392; Hughes *v.* Budd, 8 Dowl. 315; Holt *v.* Miers, 9 C. & P. 191; Firthir *v.* Edwards, Ib. 478; Gibbons *v.* Powell, Ib. 634; Foster *v.* Pointer, Ib. 718; George *v.* Thompson, 4 Dowl. 656.

Where on an examination before commissioners in bankruptcy, a machine copy of a letter was produced by the witness, of which the solicitor to the commission took a copy, held that, in an action by the assignees, the latter copy was inadmissible against the party producing the machine copy, without reading his examination, although notice had been given to produce the machine copy; Holland *v.* Reeves, 7 C. & P. 36; and see Sampson *v.* Thornton, 2 Moo. & R. 433, as to copy by a machine being admissible as secondary evidence; and see Ward *v.* Suffield, 5 Bing. N. S. 381, as to copy of an account. Where the minute books of the directors of an intended joint stock company were seen, four months before the trial, in the desk of the secretary, at the office of the company, and it was proved that he had given up the key of the desk into the hands of the manager; held sufficient to let in secondary evidence of the minutes, after refusal, upon notice to

secondary evidence becomes admissible.(*a*) The refusal however of a party to produce an office copy which he possesses, does not make the original draft available as secondary evidence; the record itself ought to be produced, or another office copy might easily be taken out; and the fact of the office copy's being in Court, so that any variance between the draft and the record might be instantly corrected while it was being read, does not alter the case.(*b*) The words "in his custody or power," have a liberal construction even at Common Law; it is no excuse for withholding a deed that it is in the hands of the party's banker or any person between whom and the party there is privity in the matter.(*c*) When the defendant conducts
[196] himself thus iniquitously there is not the same necessity as in the former cases for proving that the document is in itself un-

produce; Bell *v.* Francis, 9 C. & P. 66. Where the plaintiff, in an action at law, as secretary, sued some of several persons liable, being the committee of a society; held, that having been appointed by a resolution entered in a book, he was bound to produce it, and that it being in the custody of parties not sued, notice to the defendant to produce it did not entitle plaintiff to offer secondary evidence of its contents; Whitfield *v.* Tutin, 10 Bing. 395.

At law, in an action of trespass for shooting a dog, even without notice to produce the original, a copy of a notice on a board in the plantations of the other party, was admitted in Bartholomew *v.* Stephens, 8 C. & P. 728, *et vide supra*, p. 149, n. (*b*).]

(*a*) [See Sturt *v.* Mellish, 2 Atk. 611, and Lyn *v.* Lockwood, 2 Moll. 321; see also Stultz *v.* Stultz, 5 Sim. 460, and Hawkesworth *v.* Dewsnap, there cited, contrary to Wood *v.* Strickland, 2 Mer. 461. At law, a copy of a document is not receivable in evidence, on mere notice to produce, unless it be proved that the other party has had the original; Sharpe *v.* Lamb, 11 A. & E. 805. When, at law, a document is called for after notice to produce, the defendant may, during the plaintiff's case, produce evidence to show the document lawfully out of his possession; and on such evidence it is solely for the Judge to determine whether secondary evidence be admissible, and it gives the plaintiff's counsel no reply to the jury; Hawes *v.* Mitchell, 2 M. & R. 366. A deed being in the custody of persons not parties sued at law; held, that notice to those sued, the defendants, was not sufficient to entitle the plaintiff to offer secondary evidence of its contents; Whitfield *v.* Tutin, 10 Bing. 395, 4 M. & Sc. 166, and 6 C. & P. 228; and see Doe *v.* Owen, 8 C. & P. 110.]

(*b*) Huddlestone *v.* Briscoe, 11 Ves. 594.

(*c*) Boldney *v.* Ritchie, 1 Stark. Rep. 338; Partridge *v.* Coates, 1 Ry. & Mo. 156; Taplin *v.* Atty, 1 Ry. & Mo. 164. [A document being in Scotland, and not so within the jurisdiction as that the plaintiff could compel the production of it, secondary evidence admissible; Atkins *v.* Owens, 2 Ad. & El. 35, and 4 Nev. & M. 123. Where a document being scheduled in an answer in Chancery, was deposited in that Court, and an order made for delivering it to the party; it was held, at law, to be sufficiently within his control, so that on failure to produce it on notice, secondary evidence of it might be given; Rush *v.* Peacock, 2 Moo. & R. 162. Where, at law, notice had been given to the defendant to produce a contract, in the hands of a third party, holding it for the defendant, and the other party to the contract; held, that having a right to inspect only, and not to the possession of the document, the holder ought to have been subpœnaed, and that secondary evidence of the contents was inadmissible; Parry *v.* May, 2 M. & Rob. 279; and on the latter point see Doe *v.* Owen, 8 C. & P. 110; displacing (it would seem) the authority of Mills *v.* Oddy, 6 C. & P. 728.]

exceptionable. (*a*) And if there is any proof that he has destroyed the instrument, every point will be stretched against him, *in odium spoliatoris*. When this had occurred, in one instance, the parol testimony of the person who prepared the draft, though at the distance of several years, was admitted to prove the general contents of a deed. (*b*)

or in cases of destruction;

When it is a witness who detains the document, refusing to obey the order of *subpœnâ duces tecum*, he may be punished with all the severity that the Court has power to inflict; but the cause is not suspended to await the issue of the compulsory process; on his absolute refusal to produce the document, secondary evidence may be forthwith put in. (*c*)

non-production by a witness, after service of *subpœnâ duces tecum*.

Where either the loss, destruction, or detention, of a document, is put forward as a ground for the relief sought by the bill, the Court will not listen to it, unless the plaintiff annexes his own affidavit, declaring the truth of what he is stating, to the best of his belief. (*d*)

Affidavit of plaintiff necessary, in certain cases.

(*a*) Cooke *v.* Tanswell, 8 Taunt. 450, [S. P. Retemeyer *v.* Obermuller, 2 Moore, 93, *ut supra*, p. 273, n. (*b*), *et vide supra*, p. 272, *et* p. 173.]

(*b*) Delany *v.* Tenison, 3 B. P. C. 659.

(*c*) [Where, in an action at law, an original deed was in the hands of the attorney for the defendant, who held it as security from a client, for money advanced to him, and being served with a *subpœnâ duces tecum*, he refused to produce the deed, it was held that secondary evidence might be given; Doe d. Gilbert *v.* Ross, 7 Mees. & W. 102. As to the valid objections to the production of any document, see also Dan. Pr. Ch., by H. 839-40. The mere refusal of a witness to produce a document which he is not justified in withholding, is not a ground for going into secondary evidence of it; Jesus College *v.* Gibbs, 1 Yo. & C. 145. See also as to how far such refusals of witnesses will, at law, let in the use of secondary evidence; Mills *v.* Oddy, 6 C. & P. 728: but as to this case, see Doe *v.* Owen, 8 C. & P. 110, where Lord Abinger, C. B., denied its being law. But the result seems to be that either destruction, loss, or a detention by the other party of the original document, is, in general, the matter to be proved, before secondary evidence becomes admissible.

Where at law after notice and refusal to produce a letter written by the plaintiff's attorney on a stated day, the defendant, in order to show that no such letter had been sent produced another of a subsequent date; held that it was to be read by the Judge only, for the purpose of deciding whether secondary evidence was admissible or not; Smith *v* Sleap, 1 Car. & K. 48.

Where, at law, after notice to produce a document, and refused, secondary evidence is given, the opposite party, cannot afterwards be allowed to produce it as evidence on his own side; Doe *v.* Hodgson, 4 Perr. & D. 143; S. C. 2 Mod. & R. 283. At law also, where the attorney on whom notice to produce was served in the Assize Court on the commission day, stated that the paper was not in existence, secondary evidence of it was admitted; Foster *v.* Pointer, 9 C. & P. 720. And where, at law, an instrument called for is not produced, held that the attorney of the refusing party may be put into the box and asked whether it is in his possession, being merely for the purpose of letting in secondary evidence; Coates *v.* Mudge, 1 Dowl. N. S. 340.]

(*d*) Stokoe *v.* Robson, 3 V. & B. 51; Smith *v.* Bicknell, ibid. note.

Where the document has been partially destroyed.

If there has occurred a partial destruction or loss, the same rules hold good, as far as this circumstance has rendered them necessary. (*a*)

Where the document was originally defective.

As to parol evidence.

The same principles apply when a document is originally defective, in not sufficiently explaining what was intended to be expressed by it. But this subject requires to be carefully investigated, for another ingredient must be taken into consideration, namely that, for many purposes writing is, by the Common Law and [amongst others] the Statute of Frauds, made absolutely necessary; [as by the Wills Act also, it is generally, as to wills.]

When written evidence was not requisite.

Where the writing is mere evidence of what might be equally well proved by parol, (as a receipt for the payment of a debt (*b*),) then any defect may be supplied by the testimony of a witness, for that, in fact, amounts to a substitution of unexceptionable evidence, of as high a nature, for the part which was [197] defective. (*c*) Thus "in case of a surrender, made by a steward, of a copyhold, if there be any mistake there, that is only matter of fact, and the Courts of Law will, in that case, admit an averment that there was a mistake, &c., either as to the lands or uses. (*d*) So where a blank had been left for the patron's name in registering an institution or collation in the Bishop's Register-book, parol evidence of common report to prove who was the patron, was held admissible. (*e*)

When written evidence was requisite.

But in deeds, and wills, (*f*) and agreements for which writing is required, (*g*) the two sorts of evidence cannot be thus

(*a*) [A deed being mutilated, the objection applies to its value, not to its admissibility; Trimleston Ld. *v.* Kemmis, 9 Cl. & Fin. 749.]

(*b*) [And a receipt is but *primâ facie* evidence; *vide sup.*, p. 187, n. (*c*).]

(*c*) [But an entry, in parish books, of a sum of money, as paid to a party, was not allowed to be explained by evidence of what passed at the vestry, when it was allowed; Reg. *v.* Pembridge, 1 Carr. & M. 157.]

(*d*) *Per cur.* in Towers *v.* Moor, 2 Vern. 98.

(*e*) Meath Bp. of, *v.* Belfield Lord, 1 Wils. 215. Thus the memorandum of receipt endorsed on a deed may be affected in any way by parol evidence; Lampon *v.* Corke, 5 B. & A. 611; *secus*, if the payment is alleged in the body of the deed, *sed qu.*, Rowntree *v.* Jacob, 2 Taunt. 141.

(*f*) [As to wills, *vide supra*, p. 178, *et seq.*, stat. 7 Wm. 4 and 1 Vict. c. 26; which, we have already observed, applies to wills and testamentary appointments made on or after the 1st day of January, 1838; and indeed to other wills, although previously made, if by subsequent re-execution made subject to its provisions; by s. 9, all such wills, &c. must be in writing and executed and attested as therein provided, *vide supra*, p. 182.]

(*g*) [A bill alleging a written agreement, when writing is not necessary, may be sustained by evidence of a parol agreement; Spurrier *v.* Fitzgerald, 6 Ves. 548.]

amalgamated. (*a*) The omission of a name or other material word may not be supplied (unless indeed by necessary construction from other parts of the instrument,) and extrinsic evidence attempting to fill up the blank would be impertinent. (*b*) In *Rich* v. *Jackson*, the Court of Common Pleas refused to hear evidence of a verbal agreement respecting the land tax, alleged to have been made at the time of signing an agreement for a lease; and the cause coming on, in another form, before Lord Loughborough, C., he said, "I am satisfied that there is no difference in the case in equity, where the party only comes for a more formal execution of the agreement; I looked into all the cases; I cannot find that the Court has

Omissions.

(*a*) [Hunt v. Hort, 3 Bro. C. C. 311; Whitton v. Russell, 1 Atk. 448, neither evidence of an inferior or other nature is lieu of the proper evidence, nor extrinsic in aid of it, is available, except in certain particular cases such as hereafter adverted to; cases, chiefly, where fraud being proved, the Court of Equity is induced to relax the rule and to admit of such evidence: as *e. g.* in Hutchins v. Lee, 1 Atk. 448; Pitcairne v. Ogbourne, 2 Ves. 375: of course, the circumstances themselves under which a deed, will, agreement, or other writing was executed, if requiring to be proved at all, may be proved by mere parol evidence, as any other similar facts, as in Strafford v. Powell, 1 B. & B. 14.

An equitable mortgage may be established by means of written documents coupled with parol evidence; Ede v. Knowles, 2 Yo. & C. 172. And parol evidence is available to prove subsequent advances, made on the security of a prior equitable mortgage, by deposit of the deeds and memorandum in writing not under seal. Although a deed cannot be altered by parol evidence, yet fraud in procuring it, and the circumstances attending it, may be proved by parol evidence; Blake v. Marvell, 2 Ball & B. 47; but, of course, parol evidence is inadmissible to show the negative or intention of the parties; Blake v. Marvell, ibid. 35, affirmed 4 Dow. P. Rep. 248. Where letters are stated in a bill, as constituting the agreement, (one requiring writing) no evidence *aliunde* is admissible; otherwise where they are stated only as evidence of the agreement; Bird v. Bletchley, 6 Mad. 17.]

(*b*) [Or rather, although (as we have shown) where the deed, will, or other written document has once existed, secondary evidence may be available, under certain circumstances, to prove the contents of the instrument; yet where it has never existed or is defective none can. In short, as to matters which the law has determined shall be evidenced exclusively by written evidence, no other species of evidence can be admitted, even in equity, unless under peculiar circumstances, such as fraud and the like. Thus, for example, in case of a devise or testamentary disposition of the guardianship of infants parol evidence is generally inadmissible; Storke v. Storke, 3 P. Wms. 51. As to what agreements either by the Statute of Frauds, 29 Car. 2, c. 3, the Bankrupt Act, 6 Geo. 4, c. 16, s. 131, or the stat. 9 Geo. 4, c. 14, commonly cited as "Lord Tenterden's Act," must be evidenced by writing; see Mr. Sweet's observations, in his late edition of Bythewood and Jarman's Conveyancing, Vol. 1, p. 278, *et seq.*, where the whole subject is discussed. Instance where there was not such written agreement as excluded parol evidence, see in Hiern v. Mill, 13 Ves. 114; see also R. v. Wrangle, 2 Ad. & Ell. 514; Trewhitt v. Lambert, 10 Ad. & Ell. 470; S. C. 1 Perr. & D. 676; Reay v. Richardson, 2 Cr., M. & R. 422; Howard v. Smith, 3 Sc., N. S. 574, and Slatterie v. Pooley, 6 Mees. & W. 664. Parol evidence of a statement by an auctioneer, the contract not being reduced into writing, see Eden v. Blake, 13 Mees. & W. 614.]

ever taken upon itself to add to the form of the agreement: but in repeated instances the Court has refused to do so." His own note of his judgment says, "I cannot find that this Court has ever taken upon itself, in executing a written agreement by a specific performance, to add to it by any circumstance that parol evidence could introduce."(*a*)

The inferior evidence may however in many instances of
[198] defects be made subsidiary to the higher, and we will proceed to inquire how far that can be done. (*b*)

Defects not amounting to omissions.

Defects not amounting to omissions, are either Ambiguities, properly so called, or Difficulties which do not contain any ambiguity. Their distinctions, and the cases relating to the removal of them, when they occur in wills, have been so carefully discussed in Mr. [now Vice Chancellor Sir James] Wigram's Treatise, that any lengthened observations here will be unnecessary; they are however too closely connected with

(*a*) 4 B. C. C. 518; 6 Ves. 334, note; and see [Fitzgerald *v.* Fauconberge, Fitzg. 213; Stokes *v.* Morse, 1 Cox, 219; Davis *v.* Symonds, ibid. 402;] Irnham *v.* Child, 1 B. C. C. 92; [S. C. Dick. 554, and Lord Eldon's observations thereon, in Townshend M. of, *v.* Stangworn, 6 Ves. 332, referred to below;] Portmore Ld. *v.* Morris, 2 B. C. C. 219; Hare *v.* Sharewood, 3 B. C. C. 168; 1 Ves. jun. 240; [Robinson *v.* Gee, 1 Ves. 251; Brodie *v.* St. Paul, 1 Ves. jun. 326; Ball *v.* Montgomery, 2 Ves. jun. 194; S. C. 4 B. C. C. 339; Bridges *v.* Chandos, 2 Ves. jun. 402; Whotton *v.* Russell, 1 Atk. 448; Tyrrell *v.* Hope, 2 Atk. 560; Tinney *v.* Tinney, 3 Atk. 8; Castledon *v.* Turner, 3 Atk. 258; Clinan *v.* Cooke, 1 Sch. & L. 22, referred to more fully below; Pym *v.* Blackburn, 3 Ves. 34; *ex parte* Glendunning, Buck. 517; *ex parte* Carstairs, ibid. 560; Leman *v.* Whiteley, 4 Russ. 423; *ex parte* Morley, 2 Dea. & Ch. 50; Croone *v.* Lidiard, 2 Myl. & K. 25. And, as to agreements, see the cases at law; Flinn *v.* Calow, 1 Man. & Gr. 589; Ford *v.* Yates, 2 Sc. N. S. 645; Henson *v.* Cooper, 3 Sc. N. S. 48. As to explaining a will by a card referred to, see Clayton *v.* Nugent Lord, 13 Mees. & W. 200.

Where an agreement in writing respecting a work, to be prepared by one party and to be published by the other, is expressed in short and incomplete terms; parol evidence is admissible to explain that which *per se* would be unintelligible; such explanation, however, being not inconsistent with the written term; Sweet *v.* Lee, 2 Man. & Gr. 452; 4 Sc., N. R. 77; see also Evans *v.* Pratt, 3 Man. & Gr. 759; 4 Sc., N. R. 370.]

(*b*) [As to parol evidence to explain or control written instruments, see also Sweet's Ed. Byth. & Jar. Conv., Vol. I., p. 348; where the whole subject is more fully discussed, and the cases more fully stated, than the limits of this Work, of the subject-matter of which this forms but a very small part, would admit of. As to parol evidence to explain a will at law, see Clayton *v.* Nugent Ld., 13 M. & W. 200, case of a card referred to above, n. (*a*). In the Ecclesiastical Court, parol evidence was held to be admissible, in support of the revival of a will; Fox *v.* Marston, 1 Curt. 505. But in the Court of Chancery, *secus*; Parson *v.* Lanoe, Ambl. 559; S. C., 1 Ves. 189; 1 Wils. 243. Such evidence, however, how far admissible to shew that an instrument is not the last will of the testator as to a particular estate, see Newburgh E. of, *v.* Newburgh Css. of, 5 Mad. 364.]

other parts of our present subject to be wholly passed over with a mere reference to that valuable work. (*a*) It will be seen that his deductions are equally applicable, when extended more widely than the subject for which he wrote required.

Ambiguities, patent.

Where an ambiguity is patent, or apparent on the face of an instrument, so that the mere perusal shows plainly that something must of necessity be added, before the reader can determine which of two things is expressed by it, then the rule is inflexible, that no evidence to supply that deficiency can be admitted. It would be, as Lord Bacon says, "to couple and mingle matter of specialty which is of the higher account, with matter of averment which is of inferior account in law," and "in effect to pass that without deed which the law appointeth shall not pass but by deed." (*b*) He gives as an instance, "If a man give land to J. D. *et* J. S. *et heredibus*, and do not limit to whether of their heirs." He continues "Of these infinite cases might be put, for it holdeth generally that all ambiguity of words by matter within the deed, and not out of the deed, shall be holden by construction, or in some case by election, but never by averment; but rather shall make the deed void for uncertainty."

Difficulties, patent.

Other Difficulties in the exposition of documents, (arising from inaccuracies and various causes,) if they are wholly inexplicable, necessarily render the instrument, so far, inoperative, and void for uncertainty. (*c*) When they show themselves on the surface, it sometimes happens that they may be removed by such explanatory evidence as merely enables, or assists, the Judge to read the instrument, (*d*) or to understand the terms in which it is expressed. (*e*) Thus if it be written in a foreign language,

[199]

of language.

(*a*) [On the Application of Extrinsic Evidence to the Interpretation of Wills. 3rd ed. 1840.]

(*b*) Bacon's Law Tracts, p. 99; [and see Druce *v.* Denison, 6 Ves. 397. In a case at law, a bill of exchange in the body of it purported to be drawn for 200*l.*, in the margin for 245*l.*: held, the ambiguity was patent, and, therefore, no parol evidence admissible to explain it; Sanderson *v.* Piper, 5 Bing. N. S. 425. *Vide supra*, p. 277, n. (*b*).]

(*c*) Wigr. p. 65, [3rd. ed. p. 83.]

(*d*) [And in such cases parol evidence may be admissible to explain the terms of an ambiguously written agreement, although not to extend it; Stokes *v.* Moore, 1 Cox, 219.]

(*e*) [Thus, although parol and extrinsic evidence are not available to fill, or explain, a blank, left in a will, (*vide supra*, Hunt *v.* Hort, 3 Bro. C. C. 311,) yet when a legatee is nicknamed, or two of the same name exist, it may be used; Bayliss *v.* Att. Gen. 2 Atk. 240, *et vide infra*, p. 283, n. (*d*).]

the difficulty which that circumstance has occasioned may be cleared up by the testimony of those who are competent to interpret or translate it: (*a*) if it be scarcely legible, any one accustomed to decyphering, (*e.g.* a clerk at the Post Office,) may lend his aid; (*b*) if it contain technical words or expressions, it may be explained by persons skilled in the same science or trade; (*c*) if provincialisms, by persons residing in the same district. (*d*)

of writing,—

of words or phrases,—

of dialects.—

Usage to explain.

Under this head may be placed a kind of evidence which has been admitted to an inconvenient extent, (*e*) *viz.* that of the usage of merchants, produced for the purpose of attaching particular meanings to words and phrases. Where there was a question what was included under the following words in a mercantile contract, "charges, &c. that may be taken out of the produce of the said china ware," Lord Hardwicke said, "Courts of Law examine and hear witnesses of what is the usage and understanding of merchants conversant therein, for they have a style peculiar to themselves, which is short, yet is understood by them, and must be the rule of construction." (*f*)

(*a*) [For there is no law to enforce the use of the English language in either wills, deeds, or agreements.]

(*b*) [For bad writing may be writing, within the intent and meaning of the stat.]

(*c*) [A statuary bequeathed articles used in his business by their technical terms, some of which were very obscurely (if not illegibly) written. The Court referred it to the Master to ascertain what was meant, the Master taking to his assistance persons skilled in writing, and acquainted with articles used by statuaries; Goblet *v.* Beachey, 3 Sim. 24: but this was reversed on appeal; ib. 152.]

(*d*) [Interpreters (in effect) of that dialect.]

(*e*) See the observations of Lord Eldon, C. J., in Anderson *v.* Pitcher, 2 Bos. & Pul. 168.

(*f*) In Baker *v.* Paine, 1 Ves. 459; [Blunt *v.* Comyn, 2 Ves. 331; Bowman *v.* Horsey, 2 M. & Rob. 85: Spicer *v.* Cooper, 1 Gale & D. 52. Evidence of general usage in the trade, to which a contract refers, is admissible to interpret the contract: but to vary the ordinary meaning of plain words, the evidence must be clear and irresistible; Lewis *v.* Marshall, 13 Law J. N. S. (C. P.) 193; 8 Jur. 848. So parol evidence is admitted to prove the custom of a trade, as explanatory of intention of parties to a written contract of hiring; Reg. *v.* Stoke-upon-Trent, 8 Jur. 34; 13 Law J. N. S. (Q. B.) 41; and see Smith *v.* Boutcher, 1 Car. & K. 573. But the written agreement may and will exclude the custom of the country, if it be inconsistent therewith; as in Clarke *v.* Roystone, 13 M. & W. 752; 14 Law J. N. S. 143. And parol evidence not admissible to explain the sense in which the word "building" was used in an agreement to "win stones," &c., "for the purpose of building certain cottages;" Charlton *v.* Gibson, 1 Car. & K. 541.] The cases on the subject ought to be separately referred to, for the peculiar wording of each; they are too numerous to be abstracted here, but most of them are collected in Park on Insurance; and see 1 Phil. on Ev. 537. [Ib. 9th ed. 336. As to terms peculiar to coal-mine business, see Clayton *v.* Gregson, 4 Nev. & M. 602; S. C. 6 Nev. & M. 694.]

Usage under the instrument.

Of the same explanatory nature is evidence of usage under the instrument in question; which is often brought forward to show what meaning was originally attached to the terms of an ancient document by those who executed it or were immediately affected by it, on the principle *optimus interpres rerum usus.* (*a*) It is also applicable to modern deeds; thus, to explain an ill-expressed award of a road under an enclosure act, evidence showing that a certain strip of land had been left as a road for many years was received. (*b*) In several cases where an advowson has been granted to "the parishioners," usage has been admitted as the best indicator of the class of persons entitled under that denomination to vote in the election of a minister. (*c*) It is more commonly appealed to for expounding charters and grants from the crown. (*d*) And it has been admitted to interpret even an act of Parliament. (*e*) It may be mentioned here that "modern usage of forty years' duration," has been adjudged to be "evidence not only for that period but evidence from which it might be presumed that the same course had been pursued in earlier times, nothing being shown to the contrary." (*f*) It should be observed however that on this sort

[200]

Unless under

(*a*) 2 Inst. 282. A great deal of curious matter to this effect may be found in Com. Dig. tit. Parols; and see Withnell *v.* Gartham, 6 T. R. 388; Petre Lord *v.* Blencoe, 4 Gwil. 1484; Stammers *v.* Dixon, 7 East, 200. The doctrine of the admissibility of usage is carried to a refinement in cases where it is originally necessary to presume that a deed once existed, and usage is depended upon to shew what were the details of that imaginary instrument. [For the purpose of explaining the meaning of (not contradicting or varying) the terms used in a written memorandum of agreement, evidence of former transactions between the parties is admissible; Bourne *v.* Gatliff, 11 Cl. & Fin. 45.]

(*b*) Wadley *v.* Bayliss, 5 Taunt. 752. [As to slips of land between highway and enclosures of the Lord of a Manor, see Barrett *v.* Kemp, 2 Bing. N. S. 102, S. C. 7 Bing. 332, and 5 M. & P. 173. As to a strip of land being appurtenant to a house, &c., and the consequences in construing a deed, see Doe *v.* Wheeler, 4 Per. & D. 273. When conditions of sale excepting it, held inadmissible to contradict the deed. *Semble*, there is no universal presumption as to the ownership of a strip of land between inclosed land and a road; White *v.* Hill, 14 Law J., N. S., 79, 9 Jur. 129.]

(*c*) Att. Gen. *v.* Parker, 3 Atk. 756; Att. Gen. *v.* Foster, 10 Ves. 335; Att. Gen. *v.* Rutter, 2 Russ. 101, note; Faulkener *v.* Elger, 4 B. & C. 449; Edenborough *v.* Canterbury Archbp. of, 2 Russ. 93.

(*d*) R. *v.* Varlo, Cowp. 248; Gape *v.* Handley, 3 T. R. 288, note; R. *v.* Bellringer, 4 T. R. 810; and others collected in 1 Phil. on Ev. 522. [Ib. 9th ed. 346. In ascertaining the meaning and effect of a charter; cotemporaneous documents, proceedings in causes relating to it, and parol testimony may be resorted to, in order to explain and give to the charter a construction, but not to contradict it; Pierrepoint *v.* Scarlet, 2 Y. & J. 330.]

(*e*) Sheppard *v.* Gosnold, Vaugh. 169; R. *v.* Scot, 3 T. R. 602.

(*f*) Chad. *v.* Tilsed, 2 B. & B. 409.

a mistake.

of proof the Court will proceed with extreme caution; for it would be hard that a man who had acted in a particular manner under a mistake, should be bound for ever by his own unfortunate interpretation of his duty. (*a*)

Nature of agreement, &c.

[Under certain circumstances parol evidence may be used to explain the nature of an agreement in writing, and to show the conduct of the parties. (*b*)]

Extrinsic evidence; to show the situation of the testator, &c.

But besides this explanatory evidence, (which is [not] strictly secondary), another kind, of a totally distinct nature, is also admitted; for a Judge will (where there is a possibility of its being useful,) (*c*) receive any extrinsic evidence that tends to

(*a*) Moore *v.* Foley, 6 Ves. 238; see Cooke *v.* Booth, Cowp. 819, and Baynham *v.* Guy's Hospital, 3 Ves. 295. [In construing a charity deed, the Court will admit proof of the meaning of the founders, from evidence of their acts, their form of worship, and that of the societies of which they are members, and from cotemporaneous history; and will adopt the construction rendered probable by the evidence, provided it be consistent with the words of the deed. Instance of the Court acting upon evidence of this nature, Att. Gen. *v.* Drummond, 1 Connor and Lawson, 210. It seems sufficient, in this place, to call the attention of the reader to the opinions delivered by the Judges to the House of Lords, as to the admissibility of extrinsic evidence, for the purpose of determining what persons were entitled to the benefit of a charity, founded by Dame Hewley in 1704, for the benefit of "poor and godly preachers "for the time being of Christ's Holy "Gospel"—"Godly persons in distress "being fit objects of the foundress and "the trustees' bounty," &c.; and as to who were the proper objects of the charity, supposing the evidence to be admissible, whether Unitarians (as they call themselves) were excluded, and whether a deed of 1707, between the same parties, and concerning the same, and other charitable purposes, could be referred to, for the purpose of construing the deed of 1704; Att. Gen. *v.* Shore, 11 Sim. 616.]

(*b*) [Eden *v.* Bute Lord, 3 Bro. P. C. 679. See also Saunders *v.* Leslie, 2 Ball & B. 599; also Nicol *v.* Vaughan, 1 Cl. & Fi. 49, S. C., 6 Bli. N. S 104; Norbury *v.* Meade, 3 Bligh. 212.]

(*c*) Where a particular kind of property is given in terms so plain that the executor must purchase it, if it is not amongst the assets, the Court will not trouble itself to hear evidence which cannot possibly affect the question: in a case of this nature the V. C. (Sir L. Shadwell) said, "I have no doubt about the meaning of the words, and therefore I think I am not at liberty to look at the state of the testator's assets;" Boys *v.* Williams, 3 Sim. 573. These being, in short, cases containing no difficulty which the Court will recognise as such, the evidence is only superfluous. [But the decision of the V. C., in Boys *v.* Williams, was reversed; see 2 Russ. & M. 689, where the principle, as to the admission of extrinsic evidence, is laid down by Ld. Brougham, C., and see also Att. Gen. *v.* Grote, 3 Mer. 316, and Lord Eldon's opinion given on that case, in 2 Russ. & M. 699. In Boys *v.* Williams, on appeal, Lord Brougham referred to and relied on the case of Fonnereau *v.* Poynts, 1 Bro. C. C. 472, (which he mentioned had been recognised in Doe *v.* Jersey Lord, 2 Brod. & Bing. 551,) and on this subject see the later case, Davenport *v.* Coltman, 12 Sim. 605.

A brief reference to some of the earlier cases upon the subject of the admissibility of extrinsic evidence, in such cases, may possibly save the reader fruitless or useless researches. Such evidence was rejected in Bertie *v.* Falkland, 1 Salk. 232; Gale *v.* Croft, Dick. 23; Mabanke *v.* Brooks, Dick. 577, S. C. 1 Br. C. C. 84; Walpole Lord *v.* Orford E., 3 Ves. 402; Kirby *v.* Potter, 4 Ves. 748; Sherfold *v.* Boone, 13 Ves. 316; Powell *v.*

place him in the situation of a testator, the meaning of whose language he is called upon to declare. (*a*) And in the following observations when the word testator is used, they [may] be understood with a more extended application, for the Judge will also, in the same way, place himself in the situation of a party to a deed. (*b*) For this purpose evidence may be given of "possession by the testator, the mode of acquiring it, the local situation, the general state of the testator's property," and a variety of other similar topics. (*c*) So of a testator's being in the habit of calling, or being for certain reasons likely to call, the person or thing in question by an incorrect name or description; (*d*) as where Gertrude Yardly was misnamed Cathe-

[201]

Possession, &c.

name or description, &c.

Mouchett, and Litchfield *v.* Monchett, 6 Mad. 216; Walker *v.* Walker, 1 Mer. 503; Stratton *v.* Payne, 3 Bro. P. C. 103; Stephenson *v.* Heathcote, 1 Eden, 37. See also Ulrick *v.* Litchfield, 2 Atk. 372; Towers *v.* Moor, 2 Vern. 98; Storke *v.* Storke, 3 P. Wms. 51; Cambridge *v.* Rouse, 8 Ves. 22; (converse of Lake *v.* Lake, Dick. 236:) Reeves *v.* Newenham, 2 Ridgw. P. C. 11; Jones *v.* Currey, 1 Swan. 66, S. C. 1. Most of which cases are commented upon, or referred to, by Sir James Wigram, in his treatise on this subject; and see Perchard *v.* Benyon, 1 Cox, 214, an analogous case. The Court would not inquire into the fact of whether a testator was mistaken or not with reference to his daughter's health or capacity, assigned by his will as a reason for making a condition or restraint of marriage; Morley *v.* Reynoldson, 2 Hare, 570. On the other hand, extrinsic evidence was held admissible in Selwood *v.* Millenary, 3 Ves. 30; Gainsborough *v.* G., 2 Vern. 252; Pendleton *v.* Grant, 2 Vern. 517, Eq. Ca. Ab. 230, p. 12; Hincliffe *v.* H. 3 Ves. 516; Eden *v.* Smith, 5 Ves. 341; Bengough *v.* Walker, 15 Ves. 514; Druce *v.* Denison, 6 Ves. 385; Ulrick *v.* Litchfield, 2 Atk. 372; Colpoys *v.* Colpoys, 1 Jac. 451; Herring *v.* Whittam, 2 Sim. 493; Boys *v.* Williams, 3 Sim. 563, cited above but reversed in 2 Myl. & Cr. 689; Hewson *v.* Reed, 5 Mad. 451; Goodinge *v.* G., 1 Ves. 231; Herbert *v.* Reid, 16 Ves. 480. Most of which cases are also commented upon, or referred to, by Sir James Wigram, *ut supra*. And see Scawen *v.* S., 1 Yo. & Col 65; Sanford *v.* Raikes, 1 Mer. 653; Graves *v.* Hughes, 4 Mad. 381; Man *v.* Ricketts, 13 Law J., N. S., 194, 8 Jur. 159, S. C., 7 Beav. 93; and see Hall *v.* Fisher, 1 Coll. 47; Blundell *v.* Gladstone, 8 Jur. 301; (V. C. of E.) Moser *v.* Platt, 8 Jur. 389; (V. C. of E.) The general doctrine of the admission of parol evidence to explain a testator's intentions, and the cases of Booker *v.* Allen, 2 R. & M. 270; Weal *v.* Rice, Ib. 251, and Lloyd *v.* Harvey, Ib. 310, considered in Hall *v.* Hall, 1 Con. & Law. 120. Where the defence to an action, at law, is either fraud, circumvention, or forgery, declarations of a testator contained in an admitted codicil, held to be admissible evidence; Ellis *v.* Hardy, 1 M. & Rob. N. P. C. 525.]

(*a*) Wigr. on Extr. Ev. p. 138.

(*b*) See the opinion of Bayley, J., in Smith *v.* Doe d. Jersey, 2 Brod. & Bing. 553; see also Doe d. Freeland *v.* Burt, 1 T. R. 701. As to letters, see the words of Buller, J. in Macbeath *v.* Haldimand, 1 T. R. 182. [Cases as to deeds, Doe *v.* Statham, 7 D. & Ry. 141, *et supra.*]

(*c*) Parke, J., in Templeman *v.* Montagu, 1 Nev. & Man. 524. [But not if the terms of the will raise no ambiguity to be removed by the extrinsic evidence; Doe d. Preedy *v.* Holton, 5 Nev. & M. (K. B.) 391.]

(*d*) [In which cases letters and other evidence of declarations by the testator become admissible, to clear up the latent ambiguity. See Doe *v.* Benyon, 4 Per. & D. 193. The declarations need not be cotemporaneous; Doe *v.* Allen, Ib. 222. See also Cheney's Case, 5

rine Earnley, (*a*) or where an illegitimate person is designated by a term of relationship which he cannot legally bear. (*b*) For the sake of correcting an inaccurate description, the Court will even hear expressions which has been used respecting the disputed person or thing, and thus *incidentally* the declared intentions of a testator are sometimes brought forward as strong proof of what, when he came to make his will, he did actually, though inaccurately say. (*c*)

Effect of this kind of evidence.

This kind of evidence produces a twofold effect. On the one hand it may tend to elucidate *patent* defects, but on the other it may bring to light *latent* difficulties and ambiguities which were not before known to exist.

Difficulties latent.

[202]

Latent Difficulties which contain nothing of an ambiguous nature, are treated precisely in the same manner as those which are patent; they must be cleared up, if possible, by further evidence to show the state of the circumstances, or by secondary evidence to explain the terms in which they are expressed. (*d*) There is however one restriction; If the words as they stand are intelligible with reference to the persons and property affected by the will or deed, and there is nothing in the context or in any other papers connected with the transaction, to show that they were intended to be used in any secondary significa-

Co. Rep. 58 *a*, and Doe *v.* Meds, 2 Mees. & W. 129; Doe *v.* Hiscocks, 5 Mees. & W. 363.]

(*a*) Beaumont *v.* Fell, 2 P. Wms. 140. A testatrix had adopted a person and usually called him her heir, but when she left 4000*l.* "to her heir," it went to her heir-at-law; Mountsey *v.* Blamire, 4 Russ. 384. [On the question, if whether a testator by his "heir" meant his heir *ex parte paterna* or *ex parte materna*, extrinsic evidence was admitted, in Harriss *v.* Lincoln Bp., 2 P. Wms. 136, *sed vide* Goodinge *v.* G., 1 Ves. 231.]

(*b*) [See Beachcroft *v.* B., 1 Mad. 430. And in a case at law evidence was admitted to rebut a presumption that by his "daughter E." the testator meant his natural daughter E.; Doe *v.* Benyon, 4 Per. & D. 193. But see Hart *v.* Durand, 3 Anst. 684, a case of this kind, where the evidence was rejected, yet see, however, Woodhouselee Ld. *v.* Dalrymple, 2 Mer. 419.]

(*c*) The writer has stated the view which he takes of this particular point, but it is open to much difference of opinion: see the question discussed in the treatise of Sir James Wigram, p. 90, &c. [A parol declaration held to be important evidence giving a construction to an exception in a lease; Norbury *v.* Meade, 3 Bl. 212. Declaration of a party to a deed, made before the execution, were admitted, in support of the deed against imputations of fraud, but those made after that, rejected; Conolly *v.* Howe Lord, 5 Ves. 700. Evidence to show the intention of the parties to a deed refused in Bridges *v.* Chandos, 2 Ves. jr. 402.]

(*d*) [A latent ambiguity is propounded, and may be dissolved, by parol evidence; but such evidence is never admitted to explain a patent ambiguity; Delmare *v.* Robello, 1 Ves. J. 415, *et vide infra*, p. 285, n. (*d*).]

tion,(*a*) then, (however improbable and ridiculous may be the meaning which they literally bear), no proof from the state of the circumstances can be admitted to show an intention of saying something different from what appears on the face of the document. (*b*)

This principle explains the case of *Miller* v. *Travers* so satisfactorily, (if, as it would appear, the Judges thought that the words "in the County of Limerick and the City of Limerick" might be applied, as one description, to the same lands,) that the writer cannot help thinking that it must have had more weight with them than the argumentative part of their judgment prominently sets forth. Sir James Wigram does not seem to attach sufficient importance to the passage which immediately precedes the one that he quotes, *viz.* "Upon the fullest consideration, however, it appears to the Lord Chief Baron and myself, that admitting it may be shown from the description of the property in the city of Limerick, that *some* mistake may have arisen, yet still, as the devise in question has a certain operation and effect, namely the effect of passing the estate in the city of Limerick, and as the intention of the testator to devise any estate in the county of Clare cannot be collected from the will itself, nor without altering or adding to the words used in the will, such intention cannot be supplied by the evidence proposed to be given." (*c*)

[203]

Ambiguities latent.

When however the evidence which sets forth the state of the circumstances has discovered a latent Ambiguity, which no refinement of criticism can explain, (*d*) then the rules for

(*a*) See Wigr. on Extr. Ev. p. 14, and the cases there cited; thus in a lease "the feast of St. Michael was held to mean incontrovertibly New Michelmas Day, Doe d. Spicer, v. Lea, 11 East. 312.

(*b*) Wigr. on Extr. Ev. p. 15, *et seq.*; and see the recent case of King v. Baddeley, 3 M & K. 417; [see also Boys v. Williams, 2 Russ. & M. 693; Nelson v. Squire, 1 Yo. & C. 654; and earlier cases there cited; Crosley v. Clare, 3 Swan. 322; and S. C. Ambl. 397.]

(*c*) 8 Bing. 247.

(*d*) [See Delmare v. Robello, *ut sup.* p. 284, n. (*d*); Druce v. Dennison, 6 Ves. 397.] The Court sometimes gets rid of a real difficulty by means of a grammatical nicety, as in Castledown v. Turner, 3 Atk. 257, where the will being thus worded, "I bequeath my lands to my wife Alicia, during her life, and after her decease I give the lands to Margaret Dinton, *niece to my said wife*; Item, I give the use of £500 stock for and during *her* natural life, but after *her* decease, I give the £500 among the brothers and sisters of my said wife; it was decided that the rela-

admitting evidence undergo another modification; the object is then to ascertain which of two meanings ought to be attached to certain intelligible, (though perhaps inaccurate,) words, and if this can be done without adding to what is written, no principle is violated. The expressions are declared to apply to one particular person or thing; the other person or thing to which some parties had erroneously attributed them is put out of the question; and all difficulty ceases. The Court is therefore extremely anxious to determine this point, and, rather than declare the instrument void for uncertainty, will admit evidence of an inferior nature to point out which meaning was intended to have been, (and in fact was really,) expressed. (*a*) Thus where a fine had been levied, and the land rendered to J. S. and his son William, there being two sons named William, evidence was admitted to shew which was meant. (*b*)

tive "*her*" must be referred to the last antecedent, which is "wife," and not "niece." See also the Lord Cheyney's case, 5 Co. Rep. 68. [See also Walpole *v.* Cholmondely, 7 T. R. 138, and *in re* Chapman, 8 Jur. 902.]

(*a*) See Wigr. p. 76.

(*b*) Peynell's case, 5 Co. Rep. 68 *b.* 8 Co. Rep. 155 *a.* [See also Andrews *v.* Dobson, 1 Cox, 425; River's case, 1 Atk. 410; Hodgson *v.* Hitch, Pr. Ch. 229; Caldecott *v.* Hodgson, 2 Vern. 593; Still *v.* Hoste, 6 Mad. 192. Parol evidence to resolve the latent ambiguity arising from the testator having two nephews of the same name was admitted in Careless *v.* Careless, 19 Ves. 601; S. C. 1 Mer. 384. Testator gave the residue of his personal estate to the poor of the parish of K., in the county of L.; but the parish of K. being in the county of N., parol evidence was admitted to help the description; Brown *v.* Langley, 2 Barn. 118. Whilst, in the same case, the testator having given the residue of his personal estate to the poor of a certain parish, the amount turning out to be nearly one thousand pounds, the next of kin wished to prove that testator imagined it would only amount to ten pounds. Parol evidence on this point was refused. In a case where a testator bequeathed a legacy to the "London Orphan Society in the City-road." There was no institution precisely answering this description; but there was a "London Orphan Asylum" at Clapton, and an "Orphan Working School" in the City-road; held, that the latter was the institution meant, and that parol evidence was inadmissible; Wilson *v.* Squire, 1 Yo. & C. 654, and see the cases there cited. Devise of a house to J., the son of George Gord, another to G., the son of George Gord, and another upon the expiration of certain life estates to George Gord the son of Gord; testator also bequeathed various legacies, and amongst others to John and George the sons of George Gord to be paid on attaining twenty-one; held, that parol evidence was admissible to show the person testator meant to designate by George Gord the son of Gord; Doe *v.* Needs, 2 Mees. & W. 129. So in general parol evidence is admissible in case of an uncertain description of a person in a will; Edge *v.* Salisbury, Ambl. 71; S. C. 1 Ves. 230. And also to explain the words used in a will, but not to show any intention differing from that evidenced by the words used; Hampshire *v* Pierce, 2 Ves 216. Extrinsic evidence admitted to show the person meant by the testator by a particular, but it would seem incorrect, description; Blundell *v.* Gladstone, 12 Law J., N. S. 225; 7 Jur. 272, C. And as to ambiguity latent description of person, see Dorset D. of, *v.* Hawarden Ld., 3 Curt. 80.]

These are the general rules for removing the difficulties which occur when a written instrument is defective. They allow evidence to a certain extent for the purpose of explanation; at the same time carefully guarding against its being varied or added to. (*a*) There are however two points on which evidence causing the addition or variation in a deed will be admitted, *viz.* the consideration and the date.

Evidence to explain, but not to vary, or add to, the instrument in writing; excepting,

[204]

With regard to the first, if indefinite words, such as "for divers good causes and considerations," be used, or if no consideration be mentioned at all, then evidence will be allowed to prove what was the real one. (*b*) But "where any consideration is mentioned, as of love or affection only, if it is not said also and for other considerations," Lord Hardwicke said, (*obiter,*) "you cannot enter into proof of any other, because it would be contrary to the deed; for when the deed says it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other. (*c*) He is supported by the elaborate argument of Dyer, J., in *Villars* v. *Beaumont;* though in that case the other Judges do not seem to have coincided

as to the consideration,

(*a*) [That parol evidence of a testator's intention to execute a power is inadmissible, see Moulton *v.* Hutchinson, 1 Atk. 58; Standen *v.* Standen, 2 Ves. jun. 589. But as to other intentions to be ascertained for the purpose of explaining a will, see Blake *v.* Marvell, 2 Ball & B. 48; affirmed, see 4 Dowl. P. Rep. 248; Astlen *v.* Milles, 1 Sim. 298; Lowe *v.* Huntingtower Ld., 4 Russ. 532. In Boys *v.* Williams, (on appeal) 2 Russ. & M. 693, Lord Brougham, C., said, "It was perfectly true that the Court was not at liberty in the case of any written instrument, whether a will of real or personal property or a deed, to introduce into the consideration of the question of construction any matter furnished by extrinsic evidence, for the purpose of giving a different meaning to the words, from that which their plain import conveyed. The Court was not at liberty, by matter of fact, to overrule the construction, which was matter of law, arising on the face of the instrument itself. But that proposition was perfectly consistent with the admission of evidence to explain thought, not to control the language, to aid, though not to vary or alter the construction."

If a written instrument refer to another written instrument parol evidence is available to prove what instrument it is so referred to, but not otherwise; Clinan *v.* Cooke, 1 Sch. & L. 22; nor can such evidence be used to show which clauses in the instrument referred to have been read; see Brodie *v.* St. Paul, 1 Ves. jun. 326, where, however, the hardship of the case seems to have been perceived. In Higginson *v.* Clowes, 15 Ves. 516, such evidence was refused, but a distinction adverted to of a case where the evidence should be to resist a specific performance.]

(*b*) 2 Rolle's Abr. 786; Peacock *v.* Monk, 1 Ves. 131; Chapman d. Staverton *v.* Emery, Cowp. 278. [Whatever is wanting to show the consideration and from whom it moves may be supplied by evidence *dehors* the deed when such does not contradict it; Hartopp *v.* Hartopp, 17 Ves. 192.]

(*c*) In Peacock *v.* Monk, 1 Ves. 128.

with Dyer on the point. (*a*) It is however the opinion of a writer of high authority, that additional circumstances may be averred, if they are not inconsistent with those expressed in the deed. (*b*) And Sir J. Leach, V. C., expressly ruled "that the consideration of marriage, being consistent with the alleged consideration of natural love and affection, might be averred though not found in the deed." (*c*) Fraud causes exceptions to these rules; on the one hand, when the consideration expressed appears a valid one, proof may be given that it was in reality fraudulent or illegal; (*d*) on the other, when the consideration expressed is an illegal one, proof is not allowed of further, unobjectionable, considerations. (*e*) But where the rights of strangers are affected, evidence of the real consideration may be given. (*f*)

[205]

as to the date.

With regard to the date, there is an obvious necessity for admitting evidence to show that an instrument was executed on a different day from that which is expressed in it, for it has often to be sent for signature to parties residing at distant places, and the same date cannot possibly hold good for them all. (*g*)

(*a*) Dyer, 147 *a.*; mentioned also in 4 Co. Rep. 3; their agreement on this point was not of importance in the cause, for they were unanimous on the main question.

(*b*) 1 Phill. on Ev. 531, 533; [and so Clifford *v.* Turrell, 1 Yo. & C. 138, and Hartopp *v* Hartopp, 17 Ves. 192, *ut supra*, p. 287, n. (*b*).]

(*c*) Tanner *v.* Byne, 1 Sim. 166.

(*d*) Filmer *v.* Gott, 1 B. P. C. 234. [In one case, at law, where fraud was suspected, the witness was cross-examined to show that the consideration money had not passed, although receipt indorsed; Doe *v.* Carr, 1 Carr. & M. 123. So, at law, where a receipt was given by one of several partners without the knowledge of the others in an action to recover the debt; held, that evidence was admissible to show that the receipt was fraudulently given by a co plaintiff; Farrar *v.* Hutchinson, 1 Per. & Dav. 437. A receipt being only *primâ facie* evidence which admits of explanation; Ibid. A deed stating, contrary to the truth, a money consideration, is one circumstance in proof of fraud; Gibson *v.* Russel, 2 Yo. & C. 104.]

(*e*) Clarkson *v.* Hanway, 2 P. Wms. 204; Watt *v.* Grove, 2 Sch. & L. 501.

(*f*) R. *v.* Mattingley, 2 T. R. 12; R. *v.* Scammonden, 3 T. R 474; R. *v.* Olney, 1 M. & S. 387; [Knight *v.* Pechy, Dick. 327; Gascoigne *v* Herving, 1 Vern. 366; Newton *v.* Preston, Pr. Ch. 103. As to a statement of consideration, see Bowen *v.* Kirwan, Ll. & Go. 47, and Keating *v.* Keating, ibid. 138.]

(*g*) Hall *v.* Cazenove, 4 East, 477; see also Goddard's case, 2 Co. Rep. 4, *b*, where it is said, "The date of a deed is not of the substance of a deed; for if it hath no date or hath a false or impossible date, as the 30th day of February, yet the deed is good." [An account being tendered in evidence, held to be presumed to have been written at the time it was dated; Sinclair *v.* Baggaley, 4 M. & W. 312 *Semble*, a post dated cheque is admissible evidence to prove its own invalidity; Ede *v.* Knowles, 2 Yo. & C. 172. As to the date of an instrument, *vide supra*, p. 185.]

Agreements, deeds, &c. altered by Courts of Equity.

There are moreover many cases in which the Courts of Equity will permit both variation and addition to agreements or deeds; (*a*) and it will not be much out of place to inquire here what evidence is allowed to be introduced for that purpose.

on proof of error.

Proof will be admitted that the person who drew a deed or an agreement was under a misapprehension at the time, or accidentally fell into an error. Lord Hardwicke said, that if a party came into a Court of Equity to be relieved against a blunder in the drawer of a conveyance, the Court would do so on conditions. (*b*) In another case he said, "No doubt but this Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as against frauds in contracts: so that if reduced into writing contrary to intent of the parties, on proper proof, that would be rectified." (*c*) But, he added, that he should require "the strongest proof possible;" which words, as Lord Eldon (*d*) observes, "leave a weighty caution to future Judges." In *Shelburne* v. *Inchiquin*, (*e*) Lord Thurlow demanded "strong irrefragable evidence;" and, generally speaking, the Court will not be satisfied with anything short of the papers given to the drawer as instructions. (*f*) Upon [206] this, which, although written, is secondary and in the nature of parol evidence, the most formal documents have very frequently been altered. (*g*)

(*a*) [Parol evidence to add to an agreement in writing refused in Robinson v. Gee, 1 Ves. 251; and see Wollan v. Hearn, 7 Ves. 211; Tyrrell v. Hope, 2 Atk. 560; Croome v. Lidiard, 2 Myl. & K. 25.] A note in 3 Ves. 38, collects "the cases that on equitable grounds have been exempted from the operation of the Statute of Frauds."

(*b*) Langley v. Brown, 2 Atk. 203.

(*c*) [Scott v. Merry, 1 Ves. 2.] Henkle v. Royal Exchange Ass. Co. 1 Ves. 318. [Baker v. Paine, 1 Ves. 457: as to the necessity for putting in issue the facts to be proved, in order to establish a case of fraud, see Williams v. Llewellin, 2 Yo. & J. 68, Langley v. Fisher, *et vide supra*, p. 230, *et seq.*]

(*d*) In Marquis of Townsend v. Stangroom, 6 Ves. 333.

(*e*) 1 B. C. C. 341.

(*f*) Harwood v. Wallis, cited *arg.* 2 Ves. 196; and see *dicta* of Sir T. Clarke, M. R., in Rogers v. Earl, Dick. 295; and of Sir W. Grant, M. R., in Shergold v. Boone, 13 Ves. 376; and the judgment of Graham, B., in Hodgson v. Hancock, 1 Y. & J. 320, note. [Evidence to correct a mistake, in a will, was refused, in Ulrick v. Litchfield, 2 Atk. 372; in Alexander v. Crosbie, 1 Ll. & G., the principle was admitted, that the Court would reform a settlement, when a mistake was clearly proved. Articles previously to a settlement cannot be read to construe the settlement, unless the bill is brought to rectify the settlement, or the settlement refers to them; Pritchard v. Quinchant, Amb. 147; Clinan v. Cooke, 1 Sch. & L. 39.]

(*g*) Uvedale v. Halfpenny, 2 P.

[208]

Trusts imperfectly expressed, or secret.

As the Court is always ready, whenever it is possible, to enforce the performance of a trust, parol evidence will [sometimes] on this ground be admitted to explain an imperfect intimation of a testator's wishes, or even to add conditions to what appears a simple devise or bequest. But it must either be fairly presumable that the testator would have made the requisite alterations, but for the undertaking of the person whom he trusted, or else it must be shown to be an attempt secretly to create an illegal trust.

Of trusts imperfectly expressed there is a large class of cases; we will take the following as an instance. In *Podmore* v. *Gunning*, (*a*) Sir T. Staines devised and bequeathed the bulk of his property to his wife thus, "for her own separate use and enjoyment; having a perfect confidence, that she will act up to those views which I have communicated to her, in the ultimate disposal of my property, after her decease." At Lady Staines's death no will was found; and, in a suit for administration, evidence was admitted, that two natural children were the intended objects of the testator's bounty. (*b*)

Of trusts depending entirely on unwritten evidence the cases are also numerous. In *Thynn* v. *Thynn*, (*c*) the eldest son

kind may be given of part performance, and what is considered to fall under that term may be learned from the cases collected in 1 Mad. Ch. Pr. 376, &c.; 1 Fonbl. on Eq. 187, note. [Parol evidence not admitted on the ground of the part performance of an agreement, unless the agreement stated appears clearly to be the very same partly performed; Lindsay *v.* Lynch, 2 Sch. & L. 8; Savage *v.* Carroll, 1 Ball & B. 282; Toole *v.* Medlicott, 1 Ball & B. 298.]

(*a*) 5 Sim. 485.

(*b*) [Of this nature *semble* is the proof, by parol evidence, that a party had notice, such as the Court considers made him a trustee, Shelburn *v.* Inchiquin, 1 Bro. C. C. 340; that one who had agreed to purchase an estate in his own name, had in fact purchased it on behalf of another person, Bartlett *v.* Pickersgill, 1 Cox, 15; S. C. 1 Eden, 515; and cases like Knight *v.* Pechy, Dick. 327; Gascoigne *v.* Thwing, 1 Vern. 366; Newton *v.* Preston, Pr. Ch. 103. Parol evidence is admissible on the part of an advanced son, or his heir, to rebut a claim of trust, though improper against the legal operation of a deed; Reddington *v.* Reddington, 3 Ridgw. P. C. 182; Taylor *v.* Taylor, 1 Atk. 387; Lamplugh *v.* Lamplugh, 1 P. Wms. 111, S. P. But in a case where a son conveyed an estate to his father, nominally as a purchaser, but really as a trustee, and in order that the father might raise money on it, by way of mortgage, for the use of the son. The father died soon afterwards, and before any money had been raised, having, by a will subsequent to the conveyance, made a general devise of his real estates. It was held to be within the Statute of Frauds, and parol evidence not admissible to prove the trust; Leeman *v.* Whiteley, 4 Russ. 423;] see also, other cases collected in 5 Sim. 493, &c.; [Att. Gen. *v.* Shore, 11 Sim. 616; and, in Chancery of Ireland, Att. Gen. *v.* Drummond, 1 Dru. & W. 353, both cited above.]

(*c*) 1 Vern. 296.

induced his mother to persuade the testator to make a new will in his favour, and promised her all the benefits which she would have received under the existing will; the Court admitted evidence of the facts and compelled him to ratify his promise. In *Oldham* v. *Lichford*, (*a*) the testator bequeathed an annuity, and it was proved that he would have charged it on his real estate but that the heir-at-law promised to take care that it was paid, which promise he was decreed to make good. (*b*)

[209]

But generally aided by an admission by defendant.

But generally an admission by the defendant, to a greater or less extent, is proved; (*c*) and some Judges have been better satisfied that they were not running counter to the statute when this admission appeared in writing, even though it were only in the answer. Thus in *Barrow* v. *Greenhough*, (*d*) Lord Alvanley, M. R., speaking of a memorandum of the facts in the defendant's handwriting, said, "If it had not been for this written paper, I should have hesitated very much about admitting evidence against a written will." The case of *Mucklestone* v. *Brown* (*e*) is a leading one on this subject; it is in substance as follows. Isaac Hawkins being seised of a manor and lands at Overseale, in the county of Leicester, devised all his real estates to three persons and their heirs, without any other express limitations; and, by a codicil, he devised a newly purchased farm to two of them and their heirs, "upon trust for the like uses and purposes as my manor and estate at Overseale now stand limited." By the testator's intention, the devise was for

(*a*) 2 Vern. 506.

(*b*) See also Chamberlain's case, cited in Devenish *v.* Baines, Ch. Pr. 4; Rookwood's case, Cro. El. 164, where it was held that an *assumpsit* lay; Sellack *v.* Harris, 5 Vin. Abr. 521; Drakeford *v.* Wilks, 3 Atk. 539; Chamberlain *v.* Agar, 2 V. & B. 259. When the executor prevented the testator from adding a legacy, Lord Hardwicke considered it as a promise to pay out of the surplus assets, but postponed it to the other legacies, Reech *v.* Kennegal, 1 Ves. 123, Ambl. 67; in Barrow *v.* Greenhough, 3 Ves. 154, the Master of the Rolls ordered that it should be paid with costs out of the assets, and if the assets were not sufficient for the costs, that the executor should pay them personally. On the same principle as the above cases, "where a tenant in tail was about to suffer a recovery in order to provide for his younger children, and had been kept from it by the issue in tail promising to do it, it has been decreed by the Court;" Keck, L. C. S., Ch. Prec. 5.

(*c*) [Parol evidence to raise an equity that a pension granted to the defendant, by the Crown, was in trust for the plaintiff, not admissible against the oath of the defendant in his answer; Fordyce *v.* Willis, 3 Bro. C. C. 577.]

(*d*) 3 Ves. 155.

(*e*) 6 Ves. 52; Lord Eldon in his judgment examines the earlier authorities; and see a note to Strickland *v.* Aldridge, 9 Ves. 518.

charitable purposes; the trustees made no secret of it, and letters from them to that effect were contained in a bill filed by the coheirs-at-law for a discovery. They demurred, but were compelled to answer, and eventually the devise was declared, or admitted, to be void, by the Statute of Mortmain. These cases however are closely connected with a topic which we have before disposed of, viz. the rule with regard to pleading the Statute of Frauds. (*a*)

Parol evidence to rebut presumptions.

There are certain classes of cases, which may be briefly mentioned here, in which parol evidence has been allowed incidentally to affect the construction of wills, on the general ground that a Presumption may be rebutted, and then *e contra* corroborated, by any kind of evidence. (*b*)

[210]

I. Where legacies accumulative.

The simplest instance of this occurs when two legacies of which the sums and the expressed motives exactly coincide, are presumed not to have been intended as accumulative. Then, to rebut the presumption which makes one of these legacies inoperative, parol evidence will be received; "for," as Sir J. Leach, V. C., observes in *Hurst* v. *Beach*, (*c*) "the effect of

(*a*) *Vide supra*, p. 22, n. (*d*).

(*b*) [Parol evidence is not admissible to raise a presumption, although it is to rebut or support it when raised; Freemantle v. Bankes, 5 Ves. 79. And S. P. Andrews v. Emmett, 2 Br. C.C. 297; Standen v. Standen, 2 Ves. Jun. 589. On presumption of satisfaction by will, parol evidence admitted,—first, to establish the fact that the testator was debtor to the legatee,—secondly, to meet or fortify the presumption that the legacy was given in satisfaction; Pole v Somers Lord, 6 Ves. 321. And against such a presumption, in Wallace v. Pomfret, 11 Ves. 542. See also as to presumptions, Lake v. Lake, Dick. 236; Pring v. Pring, 2 Vern. 99; Cuthbert v. Peacock, Ibid. 593; Batchelor v. Searle, Ibid. 736; Monck v. M., 1 Ball & B. 298; and Hurst v. Beach, 5 Mad. 360, cited below. As to the presumption when two legacies are given to one person; see Hooley v. Hatton, Dick. 462. Evidence admitted of an intention, on the part of a testator, that a legacy by a codicil should be substitutional for one given by the will; see Russel v. Dickson, 1 Con. & L. 284.]

(*c*) 5 Mad. 360. He adds, "In like manner evidence is received to repel the presumption raised against an executor's title to the residue, from the circumstance of a legacy given to him." This particular part of the subject, however, need not be entered into, for the stat. [11 Geo. 4, and] 1 Wm. 4, c. 40, takes away the right of executors of all persons who have died since Sept. 1st, 1830. It is discussed at length in 2 Roper on Legacies, 652; and see 2 Wms. on Executors, 904. [But as, by analogy, the cases may be useful, a few will be here noticed.

Claiming the residue, as executor, was sufficient to let in parol evidence in support of legal title, without alleging title by the effect of the parol evidence; Lynn v. Beaver, Turn. & R. 66. A direction to "keep accounts" was held sufficient to raise a presumption that the executors were not meant to take beneficially, but parol evidence not admissible to explain away the uncertainty; Gladding v. Yapp, 5 Mad. 56. Parol evidence generally admissible to rebut the presumption in favour of next of kin; Granville Lord v. Beaufort Dss., 1 P. Wms. 114, 2 Vern. 648; Buckley

such testimony is not to show that the testator did not mean what he said, but, on the contrary, to prove that he did mean what he had expressed." Thus evidence has been admitted that the testator had declared an intention of making a further provision, or that he had received an increase of fortune, after making the first bequest. (*a*) But if from the construction of the will no presumption arises against their being accumulative, extrinsic evidence will not be listened to.

Rule of the Ecclesiastical Courts.

In the case above quoted, *Hurst* v. *Beach*, Sir J. Leach having satisfied himself that, according to the ordinary rules of evidence in the Courts of Equity, such evidence ought not to be received, in the absence of the presumption, inquired, "What is the rule of the Ecclesiastical Court in these cases? On a question as to a legacy, I should think it right to follow the rules by which they are guided, in the reception of evidence. In general, they resort to the rule of the civil law, but not in all cases. (*b*) If this case would bear the expense, I should have wished to have it argued by some civilians. Let a case be stated for the opinion of two civilians. If the case is not determined by decision in the Ecclesiastical Court, I must determine it by the principles of this Court." A case was accordingly sent for the opinions of Dr. Swabey and Dr. Lushington, which stated the will and codicil, and submitting the following questions. (*c*)

[211]

Case asked before two civilians.

"1st. Whether upon a question, in the Ecclesiastical Court, as to whether the legatee is entitled to the legacy given by the will and also by the codicil, any declarations of the testatrix of her intention that the legacy given by the codicil should be in substitution for the legacy given by the will, could, according

v. Littlebury, 3 Bro. P. C. 43; Docksey v. Docksey, Ibid. 39, S. C., 2 Eq. Ab. 506; Rutland D. of, v. R. Dss. of, 2 P. Wms. 209; Brasbridge v. Woodroffe, 2 Atk. 69; Ulrick v. Litchfield, Ib. 372; Williams v. Jones, 10 Ves. 77. Parol evidence in favour of the legal title of the executor, and to rebut the equitable presumption of that of the next of kin, to the residue undisposed of, admissible, unless the executor plainly and unequivocally declared a trustee; so for a devisee for a particular purpose, against an implied trust for the heir-at-law; Walton v. Walton, 14 Ves. 322.]

(*a*) Coote v. Boyd, 2 B. C. C. 521; Masters v. Masters, 1 P. Wms. 424.

(*b*) [See dictum of the Judge of the Ecclesiastical Court, as to the rules of evidence in the Court being identical with those of other Courts, in Conway v. Beazley, 3 Hagg. R. 651. *Semble*, in general they resort to the rule of the civil law, (so called) but that all the Courts where unshackled by laws, resort to the common sense of mankind.]

(*c*) See Coote v. Coote, 1 Bro. 448.

to the practice of the Ecclesiastical Court, be received; and whether such practice is warranted by any decision of that Court.

"2nd. Whether in questions as to the admissibility of evidence to explain a testator's intention, as to whether legacies given by a will and codicil should be accumulative, or the one taken in substitution for the other, the Ecclesiastical Court adopts, or is regulated by, the principles of the civil law."

The following answer was returned:

Their opinion.

"1st and 2nd. It is very rarely that any suit is now brought in the Ecclesiastical Courts, for the recovery of a legacy; and we are not aware that the point submitted to our consideration has ever received any decision in those Courts, nor, indeed, been the subject of discussion. In all questions upon the admissibility of evidence to explain whether a testator intended legacies given by both will and codicil to be accumulative or not, we are of opinion that the Judges of the Ecclesiastical Courts would conform themselves to the rules established by the Courts of Equity (*a*); but, in doubtful points, where the admissibility of any peculiar species of evidence had either not been discussed in the Courts of Equity or left undecided by them, we think the rules of the civil law would govern. Where legacies are given by will and codicil, the civil law presumes them to be accumulative, but, according to that law, this presumption might be rebutted by evidence produced on the part of the heir. Neither the Text Authorities, nor the Commentators, define what species of evidence would be admissible for such a purpose; nor do we believe that the nice distinctions upon the admission of parol evidence to explain written instruments were adopted in that law: we think that if such a case should arise in the Ecclesiastical Court, the course pursued would be to inquire, whether the Courts of Equity had any decided rule on the point, and, on finding that they had not,

The Courts Ecclesiastical follow the Courts of Equity.

[212]

(*a*) [And they (in general) to the rules established by the Common Law! *vide supra*, p. 4, n. (*a*). *Semble*, the Courts, ecclesiastical and civil no less than those of equity and common law, use the very same rules, although a difference of the subject-matter to be inquired into may render expedient the modification of these rules in practically applying them to the case.]

then, as the civil law has neither directly nor indirectly excluded that species of evidence, in our judgment, the Ecclesiastical Courts would admit the declarations of the testator, as to his intention." (*a*)

After this Sir John Leach took some time to reconsider the cases, and decided against the admission of the extrinsic evidence. (*b*)

II. Where legacy adeemed;

There is more difficulty in the question of the reception of such evidence when a legacy falls, or is alleged to fall, under the doctrine of ademption by the portionment of the legatee, for there the original bequest itself involves a presumption. (*c*) Lord Eldon states the doctrine thus in its simplest form. (*d*)

coming from a father;

"A legacy coming from a father to his child must be *understood* as a portion, though it is not so described in the will; and if he afterwards advances a portion for that child, though there may be slight circumstances of difference between that advance and the portion, and a difference in amount, yet the father will be *intended* to have the same purpose in each instance, and the advance is therefore an ademption of the legacy." He uses the words "understood" and "intended," because he seems to have entertained a doubt, (which other Judges have also felt), (*e*) whether these could technically be called presumptions. But the current of authorities is certainly in favour of their being so considered, and of their falling under the general rule which admits parol evidence to fortify or rebut a

(*a*) [When the effect of two codicils was to revive two separate wills, and the clear legal consequence to revive the last executed will, the Ecclesiastical Court refused to receive parol evidence; In the goods of Chapman, 1 Rob. Prer. 1.]

(*b*) Hurst *v.* Beach, 5 Mad. 351. Yet see what is said by Lord Brougham, in Guy *v.* Sharp, 1 M. & K. 602. [And see Kirk *v.* Eddowes, 3 Hare, 509, *contrà*, *vide stat.* 1 Vict. c. 26, s. 9.]

(*c*) [Where a legacy is given for a particular purpose, (as a portion,) and another bounty is afterwards given for the same purpose, it is considered as implying an intention in the testator to satisfy the legacy: but this being merely a presumption may be rebutted by evidence showing a contrary intention; Debeze *v.* Mann, 1 Cox, 346, S. C. 2 Bro. C. C. 156, and affirmed, Ibid. 519. Parol evidence is admissible to fortify the presumption of a legacy being adeemed; Monck *v.* Monck, 1 Ball & B. 298. Or to rebut presumption of ademption of legacy, without regard to the sufficiency of it; Trimmer *v.* Bayne, 7 Ves. 508.]

(*d*) In *ex parte* Pye, or *ex parte* Dubost, 18 Ves. 140.

(*e*) Lord Loughborough in Freemantle *v.* Bankes, 5 Ves. 85; and Sir W. Grant in Hartopp *v.* Hartopp, 17 Ves. 190.

[213] presumption. (*a*) In the late case of *Weall* v. *Rice*, (*b*) the Master of the Rolls (Sir J. Leach) "considered it settled by the cases of *Hinchliffe* v. *Hinchliffe*, (*c*) and *Pole* v. *Lord Somers*, (*d*) that declarations of the parent, referring to his intention at the time of making his will, (*e*) whether made at the time, or before, or after, were admissible evidence to prove that he did not mean to give a double provision." Numerous cases are cited there, and the point is discussed in Roper on Legacies, ch. 6, p. 339, where the whole subject is very ably treated. The reasoning is shortly this. If a person who has inserted in his will a legacy for a particular purpose, afterwards executes that purpose himself in his lifetime, he is presumed to have intended to cancel the legacy, which is consequently held to be adeemed. (*f*) Secondly, a father leaving a legacy to a child is presumed to have intended it for the particular purpose of fulfilling his moral obligation of portioning that child. It follows that parol on any other kind of extrinsic evidence may be adduced to prove that he did not intend that legacy as his child's portion, or that he did or did not intend to cancel it. (*g*)

from one *in loco parentis*;

Where a person stands in *loco parentis* to the object of his bounty, the same presumptions arise; and the circumstance of a testator's having so placed himself is a fact which, on every principle of evidence, a party is at liberty to prove as he can. When that has been proved the case stands exactly as when it was actually a parent. The circumstances which amount to an

(*a*) [Ademption of a legacy from a parent to a child, by a portion of the same amount, although under different circumstances. Whether parol evidence can be admitted originally of an intention to substitute the one provision for the other, or only when it is first offered against the presumption; it is clearly admissible to show that the father was the author of the portion, *e. g.* by stipulating or joining in the marriage settlement of his son, for a charge and giving up interests in consideration of it; Hartopp *v.* Hartopp, 17 Ves. 184.]

(*b*) 2 Russ. & M. 263.

(*c*) 3 Ves. 516.

(*d*) 6 Ves. 309. [Shudall *v.* Jekyll, 2 Atk. 518; Rosewell *v.* Bennets, 3 Atk. 77.]

(*e*) Or the settlement; see Booker *v.* Allen, 2 Russ. & M. 300.

(*f*) [Debese *v.* Man, 1 Cox, 346.]

(*g*) [See Sparkes *v.* Cater, 3 Ves. 530; Monck *v.* Monck, 1 Ball & B. 298; Trimmer *v.* Bayne, 7 Ves. 508.] The rule extends to the issue provided for, conjointly with the child, in the settlement or will; Weall *v.* Rice, 2 Russ. & M. 269. [Such parol evidence admitted, in such cases, not to vary the will but explain a transaction, and show that such an advance was an ademption of the legacy; Kirk *v.* Eddowes, 13 Law J., N. S., V. C. W. 402, S. C. 3 Hare, 509.]

assumption of that relationship are inquired into by Mr. Roper, and may be referred to in his book. (*a*)

from a stranger;

Where a mere stranger gives a legacy, and afterwards makes settlements or gifts, neither the one nor the other presumption can arise, because, as Lord Eldon says, "a stranger giving a legacy is understood as giving a bounty, not as paying a debt: he must therefore be proved to mean it as a portion or provision, either upon the face of the will, or, if it may be, and it seems that it may, by evidence applying directly to the gift proposed by that will. (*b*)

[214]

This last expression though thrown out *obiter*, and dubiously, has caused a difficulty in laying down the rules on the subject, because it runs counter to the general principle which excludes parol evidence. It is principally supported by the case of *Shudal* v. *Jekyll*, (*c*) in which Lord Hardwicke, by referring to such evidence, confirmed himself in giving the judgment which he was about to have pronounced without it;—the case of *Grave* v. *Lord Salisbury*, (*d*) in which Lord Thurlow ordered an inquiry into the circumstances of the advancement, but upon which it may be observed that he was pressed with the feeling that the rule places an illegitimate child, unrecognized by his parent, in a better situation than a legitimate one, and that the reference was apparently intended to include an inquiry whether the testator had in any way assumed the character of a parent;—and the case of *Powell* v. *Cleaver*, which is certainly a strong one and well considered, (*e*) yet even there no judgment was grounded upon this evidence, for though an inquiry was granted, nothing resulted from it to shake Lord Thurlow's previous opinion.

Conclusions.

Upon the whole, it is the author's opinion that the following conclusions, to which Mr. Roper's inquiry led him, are based upon the soundest principles,—"Probably it will not be deemed

(*a*) 1 Rop. on Leg. 333, 343. The cases are collected in 2 Russ. & M. 263.
(*b*) In *ex parte* Pye, 18 Ves. 133.
(*c*) 2 Atk. 516.
(*d*) 1 B. C. C. 425.
(*e*) 2 B. C. C. 517. There is also an old case at the end of 2 Vern. p. 646, Chapman *v.* Salt, which is most meagrely reported, the judgment being only these seven words, "A testamentary question. Evidence may be received."

assuming too much to observe, that notwithstanding the contrary cases, a Court of Equity will not *now* admit parol evidence to be *directly* applied to a written will to prove that a legacy by a stranger was *intended* as a portion; nor that a legacy not expressed to be given for any particular purpose, was *intended* to be revoked by a subsequent verbal gift; nor that a legacy, given by a putative father, was meant as a portion; nor that he
[215] or another person, at the time he gave the legacy, *intended* to place himself *in loco parentis.*" (*a*)

Yet it must be confessed that the late Master of the Rolls (Sir J. Leach) viewed the subject differently. In *Booker* v. *Allen*, (*b*) where the gift and legacy were different, he allowed extrinsic evidence to prove an intention of substitution. And in *Lloyd* v. *Harvey*, (*c*) where there was also a difference between the gift and the legacy, he held that certain parol evidence was "admissible; not upon the ground of fortifying or repelling a presumption, but as extrinsic evidence that it was not the intention of the testator to make a double provision for his daughter." (*d*)

III Where will cancelled by marriage and issue.

There is more difficulty still in a third question, namely, whether or no parol evidence can be admitted in support of a will, which would otherwise be declared void, in consequence of a subsequent marriage and the birth of a child. (*e*)

Early

One of the earliest cases in which this doctrine was introduced

(*a*) 1 Rop. on Leg. 343.
(*b*) 2 Russ. & M. 300.
(*c*) 2 Russ. & M. 316.
(*d*) [The following is an instance of the admission of parol evidence in case of a presumption:—A. agreed to settle 100*l.* per annum on B. his intended wife; falling sick, he devises the like amount to her; recovering he marries her, and by settlement carries the agreement into effect. Parol evidence was admitted of the intention she should take but 100*l.* per annum; Mascall v. Mascall, 1 Ves. 323.]
(*e*) [By the later act for the Amendment of the Law with respect to Wills, 7 Wm. 4, and 1 Vict. c. 26, it was enacted, by s. 18, "That every will, made "by a man or woman, shall be revoked "by his or her marriage, (except a will "made in exercise of a power of appointment, when the real or personal "estate thereby appointed would not, "in default of such appointment, pass "to his or her heir, customary heir, "executor, or administrator, or the "person entitled as his or her next of "kin, under the Statute of Distributions.") And, by s. 19, it was also enacted, "That no will shall be revoked by any presumption of an intention on the ground of an alteration "of circumstances." Nevertheless, as this act is applicable only to wills made on or after the 1st of January, 1838 (or by re-execution brought within its operation), it would impair this work to omit the old law on the subject, and the decisions relating to it, in this edition.]

into our Courts (*a*) is thus shortly reported by Salkeld; "One being single, made his will, and devised all his personal estate to J. S.; afterwards he married and had several children, and died without other will or disposition: and now, *coram delegatis*, of which Treby, C. J., was one, 'twas ruled that there being such an alteration in his estate, and circumstances so different, at the time of his death, from what they were when he made the will, there was room, and presumptive evidence, to believe a revocation; and that the testator continued not of the same mind." (*b*) principle, presumption;

Lord Keeper Wright held shortly afterwards that the presumption extended to a will of lands, (*c*) and it became established by a succession of cases as a general principle in all the Courts. (*d*) This being settled, it was "clear," (to use Lord Mansfield's words), "that this presumption, like all others, might be rebutted by every sort of evidence." (*e*) [216]

A presumption of intention, however, which was to be made although the testator had not been aware that his wife was *enciente*, and was not to be made if she miscarried, was soon found to be preposterous and untenable. Still the power of nullifying an *inofficious* will, (to borrow a term from the civil law,) was too useful to be relinquished. It was now said, by questioned;

(*a*) Overbury *v.* Overbury, 2 Show. 253, is an earlier case; it is there professed to be a notion taken from the civilians. By the common law the marriage of a woman was held to be such an alteration of her circumstances as amounted to a countermand of her will; Force and Hembling's case, 4 Co. Rep. 60.

(*b*) Lugg *v.* Lugg, 2 Salk. 592. Lord Raymond also reports it, with the addition "that it was only a presumptive revocation; and therefore if by any expression, or by any other means, it had appeared that the intent of the testator was that this will should continue in force, the marriage would not have been a revocation of it;" p. 441. [In one case there was a *quære*, as to the propriety of admitting evidence against the presumption; Gibbons *v.* Gaunt, 4 Ves. 848.

Note.—At first it was a fact presumed, viz, intention of the testator to revoke his Will. Then it became a presumption of law, viz., that marriage and the birth of a child naturally revoked a Will, and so on.]

(*c*) In Brown *v.* Thompson, 1 Eq. Ca. Abr. 413.

(*d*) Several early precedents are cited in Jackson *v.* Horlock, Ambl. 490, and in Parsons *v.* Lenoe, Ambl. 557; 1 Ves. 190, and in Brady *v.* Cubitt, Doug. 31. Peere Williams, (after citing these, and Wellington *v.* Wellington, 4 Burr. 2165; Christopher *v.* Christopher, 4 Burr. 2171, 2182, and Sprague *v.* Stone, Ambl. 721,) proceeds to say that "from them it appears that no change in the situation of a testator can amount to more than a presumptive revocation of a devise of lands, and consequently that evidence is admissible to rebut such presumption;" 1 P. Wms. 303, note.

(*e*) In Brady *v.* Cubitt, Doug. 39; Willes, Ashhurst, and Buller, J. J. concurred with him.

Lord Kenyon that, "the foundation of the principle was a tacit condition annexed to the will at the time of making it:" (*a*) and having thus declared it to be, not a *presumption*, but a *rule of law*, it followed that he could not permit it to be affected by parol evidence. (*b*) But experience showed that Lord Kenyon's principle was extremely difficult to maintain; so many important qualifications required to be added to the original simple proposition. For many instances occurred in which a strict adherence to the rule would work injustice: as,—where a settlement had been made,—where the will affected a part only of the testator's property, (*c*)—where he married the devisee, (*d*)—where the children had died before him,—and various others; and the doctrine having been much discussed, (*e*) it became evident that the rule of law must be laid down in a shape at least as much modified as the following, "When a man having made a will disposing of his whole property, marries, and either leaves (*f*) issue, or issue is born to him posthumously, and he dies without having made any provision for such issue, either by his said will or otherwise, (*g*)—and he does not leave their mother sufficiently provided for, either by his said will or by settlement, to maintain them, (*h*)—and the revocation does not work injustice to issue by a former marriage, (*i*)—then the will is *ipso facto* revoked." The last

more modern principle, rule of law.

[217]

Rule stated with its restrictions.

(*a*) Sir W. Grant, M. R. expresses it thus, "The condition implied in those cases was that the testator when he made a will in favour of a stranger or more remote relation, intended that it should not operate if he should have an heir of his own body;" in Sheath *v.* York, 1 V. & B. 398.

(*b*) Doe d. Lancashire *v.* Lancashire, 5 T. R. 60, but see a note in 2 East, 534.

(*c*) Wills of personalty, now that the residue does not go to the executors, very frequently leave a part undisposed of.

(*d*) A curious combination of circumstances was lately brought before the V. C. in an application for a writ "*de ventre inspiciendo*;" a man having devised all his property to a woman, as long as she should remain single, married her, and died leaving her *prisement enceinte*. [And see Mascall *v.* Mascall, 1 Ves. 323, cited above, p. 300, n. (*d*).]

(*e*) Particularly in Doe d. Lancashire *v.* Lancashire, 5 T. R. 60; Goodtitle *v.* Otway, 2 H. Bl. 516; Kennebal *v.* Scrafton, 2 East, 530; 5 Ves. 663; Gibbons *v.* Caunt, 4 Ves. 848; Gibbons *v.* Cross, 1 Add. 455; Johnston *v.* Johnston, 1 Phill. 447.

(*f*) The necessity of the issue surviving is not recognised in the Ecclesiastical Courts; Emerson *v.* Boville, 1 Phill. 342.

(*g*) See Gray *v.* Altham, Ambl. 490; Lord Mansfield's judgment in Brady *v.* Cubitt, Doug. 38; Kennebal *v.* Scrafton, 2 East, 530; *ex parte* Ilchester Earl of, 7 Ves. 348; Wilkinson *v.* Adams, 1 V. & B. 465.

(*h*) Brown *v.* Thompson, 1 Eq. Ca. Abr. 413.

(*i*) Thompson *v.* Sheppard, 1 V. &

modification might be sub-divided almost interminably, and shows the extreme indefiniteness of the rule. In *Sheath* v. *York*, the Ecclesiastical Court held that the will in favour of former children was revoked, as to the personalty; but Sir W. Grant, M. R., supported it as to the realty: and Sir S. Romilly remarked, "The argument in this case shows the extreme danger of Courts assuming the power of legislating. The effect is great difficulty in ascertaining the rule, always fluctuating; and there are no means of distinctly tracing the principle, upon which the different decisions have proceeded." (*a*)

Observations of Sir Sam. Romilly.

[218]

To sum up the point; parol evidence is on general principles inadmissible against a definite and decided rule of law; but as in the above cases the Courts have been aiming at substantial justice, it is probable that in a case of hardship they would resort to any evidence from which they could derive assistance. (*b*) It may be worth considering whether it might not be expedient to surmount the technical difficulty by further modifying the rule itself, thus, "and provided he has not expressed any intention that the will should remain unrevoked." (*c*)

Conclusion.

B. 394, note; and see Emerson v. Boville, 1 Phill. 343; Holloway v. Clarke, 1 Phill. 339.

(*a*) 1 V. & B. 396.

(*b*) Parol evidence was admitted, in the cases cited above, by the Ecclesiastical Courts; and see a note of Mr. Justice Patteson, 1 Saund. 277. There is a fallacy in the reasoning contained in a note, 2 Stark. on Ev. 569, that, "The practice involves an inconsistency. If the intrinsic circumstances be so powerful as to create a stronger presumption as to the intention of the party than that which arises from his own written exposition of that intention, (which still remains uncancelled), how can that presumption be considered so weak as to be met and defeated by mere oral declarations? It seems to be inconsistent to consider such evidence to be more forcible than the written instrument and yet weaker than oral evidence." The fact is that the parol evidence does not of itself overthrow the strong presumption, but merely assists and enables the uncancelled will to withstand it.

(*c*) [The Legislature, by stat. 1 Vict. c. 26, ss. 18 and 19, has (in the manner referred to above p. 300, n. (*s*)) endeavoured to set this difficult matter at rest; but it still remains to be proved how far "substantial justice" will be attained.]

SECTION III.

HEARSAY.

HEARSAY is inadmissible, on two weighty grounds of objection, the original assertion has seldom been spoken upon oath, and the speaker can never be subjected to a cross-examination in the cause. (*a*)

What the term includes.

[219]

The term Hearsay must be understood to include assertions in writing as well as those by word of mouth. But it should be observed that words spoken or written are often themselves the fact, or form a part of the fact, to be proved, as that a party made a verbal agreement, or wrote and sent a certain letter; (*b*) and also that they are often so connected with a transaction as to give a colouring to it, as the declarations of a trader at the time of an alleged act of bankruptcy. (*c*) To cases like these, the rules excluding hearsay, as evidence of a fact, are not applicable. (*d*) It should also be remembered that under the head of secondary evidence some kinds of hearsay have been mentioned as receivable, for instance, the deposition at a former trial of a witness now kept away by a party. (*e*)

(*a*) [But in cases relating to clandestine marriage, hearsay evidence and declaration are not defective proof, but have weight with the Court, especially when uncontradicted by anything on the other side; Beard *v.* Travers, 1 Ves. 313.]

(*b*) [See Rawlins *v.* Desborough, 8 C. & P. 321, an instance of this distinction; see also Jeans *v.* Wheedon, 2 Mood. & Rob. 486.]

(*c*) Bateman *v.* Baily, 5 T. R. 512; and see Phil. on Ev. 220.

(*d*) [Entries of the admissions of a party to the freedom of a city company duly vouched by other freemen, were admitted in evidence, not on the ground of an exception to the rule against hearsay evidence, but as evidence of an act done by the company; viz. receiving the party as of a certain description, who and what he was to be entitled to admission; (*per* Tindal, C. J.) Collins *v.* Maule, 8 C. & P. 502. This case naturally suggests that the entries of admissions in the books at colleges in the Universities may be susceptible of use as evidence, and by the same rule the matriculation and subscription books of the Universities. As to these and other similar sources of information and instruments of evidence, see Hubb. Ev. Succ.]

(*e*) *Vide supra*, p. 258. Green *v.* Gatewick, Bull. N. P. 243. [Notes on brief of counsel at trial at law; Cattell *v.* Corrall, 3 Yo. & C. 413. Where in an action at law it was sought to read

There are, however, exceptions to the general rule. Exceptions.

First; When the hearsay does not profess to be the assertion of an individual, but the voice of common rumour, and in fact amounts to Reputation, then it may be used as evidence of certain kinds of rights. (*a*) I. Reputation.

Reputation is usually said to be evidence of public, and not evidence of private rights: (*b*) but Mr. Justice Bayley, with his accustomed accuracy, modifies the rule thus, "I take it "that where the term public right is used, it does not mean "public in the literal sense, but is synonymous with general; "that is, what concerns a multitude of persons." (*c*) It is not necessary that the bodies of persons whose rights are affected, or any individuals representing them, should be parties to the suit. (*d*) To prove —public or general rights; [220]

For or against public rights of way, navigations, tolls, &c.: (*e*) —of way, &c.;

the depositions of a witness alleged to be abroad, the evidence as to his having quitted the kingdom was only on the hearsay of the others; held, that proof of inquiries, at the abode of the witness, and the answers received, were not sufficient to let in the depositions; Robinson *v.* Markis, 2 Mood. & R. 375.]

(*a*) Not of *facts*, (except in pedigree cases, *vide infra*, p. 316; and except so far as public Histories, &c. partake of the nature of hearsay, *vide infra*, P. III. ch. 1, § 1,) Grose, J. in R. *v.* Eriswell, 3 T. R. 709; Lord Kenyon in Outram *v.* Morewood, 5 T. R. 121; Chatfield *v* Fryer, 1 Pri. 253; Garnons *v.* Barnard, 1 Anstr. 298; but Lord C. B. Macdonald takes a distinction, in Harwood *v.* Sims, Wightw. 112. "Reputation, if you confine it to the fact of payment, would not be evidence unless the tradition that came with it was a reputation that that had always been the case: the essence of reputation is that if you prove a fact, as for instance payment of a sum of money, it must be accompanied with this, that it was so paid in consequence of a reputation." Meath Bp. of, *v.* Belfield Ld., 1 Wils. 215, which also seems an exception, is commented upon by Lord Kenyon in R. *v.* Eriswell, 3 T. R. 723.

(*b*) Lord Kenyon lays down as the rule, "because all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them having all the same means of information;" in Morewood *v.* Wood, 14 East, 329, note; where see also the case of Clothier *v.* Chapman, and the principal case. Lord Ellenborough "confesses that he cannot see the force of the principle so clearly as others have done, though he must admit its existence."

(*c*) In Weeks *v.* Sparke, 1 M. & S. 690; [Lonsdale *v.* Heaton, 1 Yo. 58. But, (by the way,) upon a question as to the duty of the sheriff of the county, or of a city, to do execution on criminals, not relating to a public right, evidence of reputation was held to be inadmissible; Rex *v* Antrobus, 6 C. & P. 791. And yet this duty seems to concern the rights of the public.]

(*d*) [And see Riddeford *v.* Partridge, 3 Anst. 646.]

(*e*) As in Reed *v.* Jackson, 1 East, 355. [Right of ferry, as in Pim *v.* Curell, 6 Mees. & W. 234. As to custom of mines, as in Crease *v.* Barett, 1 Cr., M. & R. 919. As to right of way, as in Barraclough *v* Johnson, 3 Nev. & P. 233. To negative a right, as in Drinkwater *v.* Porter, 7 C. & P. 181: and see Reg. *v.* Sutton, 3 Nev. & P. 569, and Reg. *v.* Bliss, 2 Nev. & P. 464, as to what is not evidence of reputation Depositions in a suit held to be inadmissible, as evidence of reputation, as to a ferry, in Pim *v.* Curell, 6 M. & W. 234. Verdict by a

reputation is often adduced in evidence. Still oftener, to affect parochial or manorial customs; as the rules which govern the copyholders, (*a*) the ownership of wastes, the right of the lord to minerals: (*b*) in one case it seems to have been admitted to prove that the trees in a woody belt which surrounded a manor and passed over the land of freeholders, were the property of the lord. (*c*) It was allowed to prove a prescriptive right of tilling a common, (*d*) because the general right of the other commoners was abridged by it; (*e*) but the Court was divided when the claim was for a prescription to dig stones on the lord's waste. (*f*) The boundaries too of parishes and manors may be thus proved; because "they are, more or less, of public concern." (*g*) It is asserted *arguendo* in *Weeks* v. *Sparke*, that it was understood to be the uniform practice of the Court of Exchequer to admit [evidence of] reputation upon questions of *modus*, without regarding the distinction whether the *modus* pervades a whole parish or affects a particular farm only. (*h*)

—customs, parochial or manorial;

—boundaries of parishes or manors.

As to a *modus*.

manor jury, finding A. heir-at-law to B., Maule *v.* Mounsey, Rob. (Prer.) 4; being *res inter alios acta*.]

(*a*) Foster *v.* Sisson, 12 East, 62; Beebee *v.* Parker, 5 T. R. 26; and see the remarks there, on a *dictum* of Lord Coke, and Denn *v.* Spry, 1 T. R. 466.

(*b*) Barnes *v.* Mawson, 1 M. & S. 77; where the lord's claim was to dig for coals, under certain points of his manor, called the new lands.

(*c*) Stanley *v.* White, 14 East, 332.

(*d*) [Stat. 2 & 3 Wm. 4, c. 71, s. 4, is nothing more than an exposition of the proof requisite to support the right to common; Jones *v.* Price, 3 Bing. N. S. 52.]

(*e*) Weeks *v.* Sparke, 1 M. & S. 679.

(*f*) Morewood *v.* Wood, 14 East, 327, note; and see Blackett *v.* Lowes, 2 M. & S. 494. [Parol evidence of common report, to prove who was patron of a living; Meath Bp. of, *v.* Belfield Lord, 1 Wils. 215. It concerns all the parish.]

(*g*) Nicholls *v.* Parker, 14 East, 331, note; Weeks *v.* Sparke, 1 M. & S. 685, 687. [As to boundaries, see Evans *v.* Rees, 2 P. & D. 627, and 10 Ad. & Ell. 151; Thomas *v.* Jenkins, 1 Nev. & P. 588; Briscoe *v.* Lomax, 3 Nev. & P. 388. A county history is not admissible to prove such boundaries; Evans *v.* Getting, 6 C. & P. 586. *Semble*, an entry in a parish book, recording the fact of a perambulation, in a particular direction, is inadmissible; Taylor *v.* Devey, 7 Ad. & Ell. 400; S. C. 2 Nev. & P. 469. In what case an old map of an estate may be good evidence, to ascertain the quantities and boundaries of particular lands, see Wilkinson *v.* Allott, 3 Bro. P. C. 684. In a suit for tithes, between a vicar and occupier of a mill, an old map of the parish belonging to the lord of the manor, not admissible for the defendant; Newcome *v.* Matthew, 5 Sim. 243. Boundaries of manors may be proved by evidence of a map, proved by the maker of it to have been made by him, from the information of a man, then sixty years old, who went round and shewed them to him, and is since deceased, his death being first proved; Reg. *v.* Milton Inhabitants of, 1 Car. & K. 58.]

(*h*) Citing Webb *v.* Petts, Noy. 44; [and see Brazier *v.* Mytton, 1 M'Cl. & Yo. 613.]

But later decisions have fully established the distinction; (*a*) and the contrary practice is now undisputed. [221]

The admissibility of reputation as evidence of private rights when prescriptive, was a *vexata questio* for many years in Westminster Hall. The practice of the circuits differed; on the Oxford circuit it was rejected, on the Western it was received; (*b*) and in the above well-known case before the King's Bench, two of the Judges having belonged to each of those circuits, the point remained undecided. But in the later case of *Weeks* v. *Sparke*, (*c*) Lord Ellenborough gives his opinion in favour of the side which Lord Kenyon had supported; namely, that where the right claimed does not curtail the general rights of others, being merely the claim of an individual against an individual, reputation is not admissible. (*d*) In the foregoing cases, those Judges who have maintained the other side, have generally admitted, that acts, in exercise of the right claimed, were necessary to be proved, as a foundation for reputation of the prescription. And the decisions respecting farm moduses, above cited, may be considered to have set the question at rest.

But to prove private rights, *qu.*;

unless they curtail the general rights of others.

Reputation is good evidence of marriage and of relationship: (*e*) of marriage though the party adducing it sought to

Marriage and relationship.

(*a*) Pritchett *v.* Honeyborne, 1 Y. & J. 135, and other cases unreported; Mr. Boteler gave up the question, without dispute, in Hadow *v.* Barnett, Exc. 12 Dec. 1834, MS. [Evidence of reputation of exemption of a district from tithe, read, *de bene esse*, in Donnison *v.* Elsley, 1 M'Cl. & Yo. 24. It is no objection to evidence of such reputation that the deceased person, from whom it came, was liable to pay tithes; Harwood *v.* Sims, Wightw. 397. What is admissible evidence of reputation in a tithe case, see Moseley *v.* Davies, 11 Price, 162; Ward *v.* Pomfret, 5 Sim. 475; Harwood *v.* Sims, Wightw. 397. Further, as to a *modus*, see Phill. on Ev. 9th ed. p. 238, *et seq.*]

(*b*) Buller, J., in Morewood *v.* Wood, 14 East, 329.

(*c*) 1 M. & S. 679.

(*d*) [So upon a question as to the right of the lord of a manor to wreck; held that the answers of persons, some tenants of the manor, to a commission issued by a former lord, stating the title of the lord, were inadmissible; the right being of a private nature, and the persons making the declaration possessing no peculiar means of knowledge; Talbot *v.* Lewis, 1 Cr., M. & R. 495, 5 Tyrw. 1; and 6 C. & P. 605.

As to a claim of free warren over a whole manor by prescription, evidence of reputation is admissible; Caernarvon E. of, *v.* Villebois, 13 Mee. & W. 313, 14 Law J. 233. Further, see Phill. on Ev. 9th ed. p. 241, *et seq.*]

(*e*) [As to marriages (after the 1st of Mar. 1837,) solemnised, contracted, or registered only; see the stat. 6 & 7 Wm. 4, c. 85. As to declarations of members of the family, with regard to matters of pedigree, see Walker *v.* Beauchamp, 6 C. & P. 560, *et vide infra*, p. 316.]

Upon a question of legitimacy, A. produced witnesses, who swore to a marriage, in fact, between his parents, and he ob-

recover as heir-at-law while his parents were still living. (*a*) It is questionable whether the exact degree of consanguinity is necessary to be shown before it can be received as proof of relationship. (*b*)

II. Where there is great improbability of falsehood.

Secondly; The Court will also venture to receive hearsay evidence, under certain circumstances, where the interests of parties [making the declarations, oral or written,] raise a great improbability of falsehood. (*c*)

Statements of one who had peculiar means of knowing.—and against his interest.

Thus where a declaration of a fact has been made by a person who had peculiar means of knowing its truth, (*d*) and such declaration is contrary to his own interest, (*e*) [and he deceased,] it is evidence for or against third parties; (*f*) but the

tained a verdict; on a second trial he declined to produce these witnesses, and rested solely upon a reputation of the marriage: although he again obtained a verdict, yet this is not sufficient to satisfy the conscience of a Court of Equity; Sherborne *v.* Napier, 2 Ridgw. P. C. 224. The rule as to proof of marriages, births, &c. by the parochial and other registers, in the absence of living witnesses, *vide supra*, p. 167. But this rule has been held not to apply to Ireland, where such registers have not been duly kept; therefore, in one case, copies of instruments and evidence of reputation were received, after proof of proper search made and of no registers having been found; Vaux Peerage Case, 5 Cl. & Fi. 526. To prove a Scotch marriage the assent of both parties thereto must be very clearly and distinctly proved at law, at least in criminal cases; Graham's Case, 2 Lewin, C C 97. Yet Lord Eldon, C., once observed, it was difficult to say what was not a sufficient marriage, according to the law of Scotland in such matters. Neither the (so called) register of baptism, by a Popish priest, D'Aglie *v.* Fryer, 13 Law J., N. S., R. 101, or of circumcision, by a Mosaic Rabbi, Davis *v.* Lloyd, 1 Car. & K. 275, can be made available as evidence. As to the (so called) Non-parochial registers, *vide supra*, p. 167, n. (*f*).]

(*a*) Doe d. Fleming *v.* Fleming, 4 Bing. 266.

(*b*) Roe d. Thorn *v.* Lord, 2 Bl. Rep. 1099. [On this, and indeed all similar points, the reader may usefully refer to Hubback on Ev. of Succession.]

(*c*) [But, in general, evidence of a declaration of one since deceased, as to a fact done by himself, is not admissible; Garnons *v.* Barnard, 1 Anst. 298.]

(*d*) [The declaration being made by him in the course of his duty, and relating to such; *vide infra.*]

(*e*) [Or, at least, contrary to his own interest, as to his knowledge; that is matter affecting its credibility only; Crease *v.* Barrett, 1 Cr., M. & R. 925. *Sed vide infra*, p. 315.]

(*f*) [Such declarations (not being admissions of the parties, as to which see hereafter,) but merely made in the ordinary course of business, see the subject discussed in Pickering *v.* Ely, Bp., 2 Yo. & C. 249; or in exercise of an office, or performance of a duty, see Reg. *v.* Cope, 7 Car. & P. 720; although the party making the declaration has no interest to which such is contrary. But see the case of the Sussex Peerage, 11 Cl. & Fin., where this matter was much discussed.] Where such declarations are used against privies, they are in the nature of admissions, and fall under another Chapter. [See Rudd *v.* Wright, and observations thereon, in Phill. on Ev., 9th ed., vol. 1, p. 314. On the necessity for calling attention, by the pleadings, to conversations and admissions intended to be proved, see Langley *v.* Fisher, 9 Jur. 1066. As to admission in evidence of a survey and marginal note thereto annexed, see also Stark. on Ev., vol. 1, p. 615.

And as to declarations of an agent within the scope of his authority; R. *v.* Hall, 8 C. & P. 358. In an action at law for goods, &c., statements of the plaintiff's wife, as to whom credit was given, not admissible; Duckworth *v.* Johnston, 1 Car. & K. 584.]

whole context of the declaration must be taken. (*a*) The statement of an occupier of land, since deceased, that he rented it from A. B. may be used as proof of A. B.'s ownership: (*b*) that of a widow, that she was tenant for life, of her not holding adversely. (*c*) An expression of a person, who was felling timber on his own freehold, that certain trees, which he left standing, were the lord's, as proof that they were so. (*d*) Upon an issue between A. and B., whether C. died possessed of certain property, evidence was given of declarations made by C. that she had assigned the property to A. (*e*) To these may be added acknowledgments of trusts by persons deceased. (*f*) [222]

Receipts or entries in books, &c.;

The rule is much more frequently exemplified in documentary evidence. (*g*) A receipt, or an entry in a debt book marked and [made] paid, in the handwriting of the deceased creditor, is evidence of the whole transaction which it states. (*h*) A bank-

(*a*) Lord Ellenborough says, "It is "idle to say, that the word *paid* only "shall be admitted in evidence, without "the context, which explains to what it "refers; we must therefore look to the "rest of the entry," &c.; Higham *v.* Ridgway, 10 East, 117. [And so, in Davis *v.* Humphries, 6 M. & W. 153, (following the last case and that of Doe *v.* Robson,) see the observations of Parke, B.; see also Marks *v.* Lahu, 3 Bing. N. C. 408; S. C. 4 Sc. 137.]

(*b*) [Doe *v.* Green, 1 Gow. 227;] Uncle *v.* Watson, 4 Taunt. 16; Davies *v.* Pierce, 2 T. R. 53; where it was also used to shew that a certain piece of land belonged to the estate; and see Baggaley *v.* Jones, 1 Camp. 367. [Carne dem. Nicholl, ten. 1 Bing. N. S. 430, S. C. 1 Sc. 466. But this extends not to what the tenant or occupier stated he had heard others say; Trimleston Ld., *v.* Kimmis, 9 Cl. & Fin. 784; Wells *v.* New Coll., Oxon., 7 C. & P. 284. But on an issue as to the right of the plaintiff to an easement over the land of the defendant; held, that the declarations by a former occupier of the land were not admissible; Scholes *v.* Chadwick, 2 Moo. & Rob. 507.]

(*c*) Human *v.* Pettett, 5 B. & A. 223.

(*d*) Stanley *v.* White, 14 East, 341.

(*e*) Ivat *v.* Finch, 1 Taunt. 141.

(*f*) [Strode *v.* Winchester, 1 Dick. 397.]

(*g*) [As, for example, declarations made by persons, since deceased, in the due performance of a duty or service relating thereto, when only evidenced by their own handwriting; as an entry, of his having presented a bill, made by the clerk of a notary, in the due course of business; Poole *v.* Dias, 1 Bing. N. S. 649; and see Doe *v.* Turford, 3 B. & Ad. 890. Entries in books of attornies, see Clark *v.* Wilmot, 1 Yo. & C. 53: although not against interest. And entries in the bill of an attorney, subscribed as having been received, used as secondary evidence of the execution of deeds; Skeffington *v.* Whitechurch, 3 Yo. & C. 24; but see Doe *v.* Whitefoot, 8 Car. & P. 270, such evidence was refused. An entry in a parish book of a fee received by the sexton, in the course of his duty, used, in Lloyd *v.* Wait, 1 Phil. 61, as evidence of a fact, therein alluded to.]

(*h*) Warren d. Webb *v.* Grenville, 2 Str. 1129; Bridges *v.* Duke of Chandos, 2 Burr 1072; Higham *v.* Ridgway, 10 East, 117, *ut sup.* n. (*a*); where a surgeon's note of payment for attending at the birth of a child was admitted, many years afterwards, as evidence of its age; Haddow *v.* Parry, 3 Taunt 303; Goss *v.* Watlington, 3 Brod. & B. 132; Ward *v.* Pomfret, 5 Sim. 475; and see cases cited in 1 Phil. on Ev. 244, note. [When one has made an entry charging himself, and is since deceased, it is not necessary that he should be shewn to

rupt's books, or an account, signed by him, charging himself with a balance, if written or signed by him previously to the act of bankruptcy, are available for his assignees. (*a*) The entries made by bailiffs and stewards, of rents, &c., received by them, are very often useful in evidence. (*b*)

by bailiffs and stewards, &c.

have had knowledge of the fact stated; the absence of such knowledge going to the weight, not the admissibility of the entry in evidence; Crease *v.* Barrett, 1 Cr., M. & R. 925.]

(*a*) Watts *v.* Thorpe, 1 Camp. 376; Hoare *v.* Coryton, 4 Taunt. 560. [As to evidence by his Balance-sheet and Examination, *vide* Courtenay *v.* Williams, 3 Hare, 359.]

(*b*) Barry *v.* Bebbington, 4 T. R. 514; Manning *v.* Lechmere, 1 Atk. 453; Harper *v.* Brook, 3 Woodd. Lect. 332; and see Stead *v.* Heaton, 4 T. R. 669, a case of an entry in a parish book. [Of the use, in evidence, of an entry in his books by a testator, in proof of—a gift, see Ryle *v.* Haggie, 1 Jac. & W. 234;—of a claim, Lefebure *v.* Warden, 2 Ves. 54;—a discharge of a debt, Eden *v.* Smyth, 5 Ves. 350. The accounts kept by a clerk or book-keeper, an agent appointed by the parties, admissible in evidence, after his death, both as charging himself, and as admissions by an agent; Edwards *v.* Rees, 7 C. & P. 340. A pass-book, between a banker and his customer, is not evidence of a settled account; *Ex parte* Randleson, 2 Dea. & Ch. 534, and see Lefebure *v.* Warden, 2 Ves. 54. Where the first column of certain rent-rolls contained names of tenants and amounts of rents, in the handwriting of the owner, and the next the amounts received and dates, in the handwriting of a steward, since deceased, the whole admissible, though not signed by the steward; Doe *v.* Colcombe, 1 Car. & M. 155. Entries made by the plaintiff's steward, and his agent, and accounts of the "H. rents," in their respective handwritings, although not signed by them, held admissible; Doe *v.* Mobbs, 1 Car. & M. 1. Where written accounts are used, in evidence, as declarations by a person, charging himself; it is no objection that they are not written by the person's own hand, if it be proved that they were written by his agent, duly authorized for the purpose, and that he adopted them; even though the agent be alive at the time of the trial; Doe d. Graham *v.* Hawkins, 2 Ad. & El., N. S. 213: and even if the entries be not written, but only signed, by the agent; Doe *v.* Stacey, 6 C. & P. 139: and even if the persons who paid the monies are living and examinable; Middleton *v.* Melton, 5 M. & Ryl. 264, and cases cited. Entries in accounts of receivers of a city admitted, as secondary evidence, in Exeter M. of, *v.* Warren, 5 Q. B. 773. So in a *compotus* of a *prepositus* or reeve; Bruce *v.* Thompson, 1 Carr. & M. 34. Evidence of statements of a deceased collector, to his employer, that certain sums, in his account, had been received as the rents of certain premises, held admissible; Fursdon *v.* Clogy, 10 Mees. & W. 572. Although the entry made by a steward, deceased, showed the balance in his own favour, held that it did not affect the admissibility of a particular item, whereby he charged himself; Williams *v.* Greaves, 8 C. & P. 592. But entries made by a steward in his own favour, and unconnected with other entries against him, not admissible as evidence of the facts stated in them; Knight *v.* Waterford M. of, 4 Yo. & C. 284. As to entries in a merchant's letter-book, see Sturge *v.* Buchanan, 2 Perr. & D. 573; *et infra*, p. 314, n. (*b*).

Declaration of an agent of the defendant made otherwise than in the course of the transaction alluded to, held not admissible; Allen *v.* Denstone, 8 C. & P. 760. Where it was the duty of A. to give notice to the foreman, of all coal sold, and A. (being unable to write) employed B. to make entries thereof from his information, both being since dead; held, the entries were not admissible; Brain *v.* Prim, 11 Mees. & W. 778. Entries, in an account-book, by one deceased, made neither against his interest nor in the course of a business or employment, nor as embodying a contract, but merely by way of memorandum, not evidence; Reg. *v.* Worth., Inhabitants of, 4 Ad. & El. N. S. 132; 3 Gale & D. 376; S. C. 7 Jur. 172; 12 Law J., N. S. 144, and see a *quære* in Fursden *v.* Clogy, 10 Mees. & W. 572. It seems hardly necessary to add that an entry made by one deceased, in

[223]

It has been (perhaps unwarrantably) extended still further. Leases are received as evidence in favour of those claiming under the lessors: modern ones indeed carry little or no weight, unless possession be proved to have gone under them; but ancient leases need no such corroboration. (*a*) Old licenses for fishing, entered in the Court rolls of a manor, were admitted, to prove a several fishery in the lord; though they would not have been much regarded, if they had stood alone. (*b*) But although ancient leases, &c., are evidence, receipts for rent, or entries made in a memorandum book, by the landlord himself, (*c*) are not admissible for any one claiming under him, unless actual payment be proved (*d*); because nothing would be easier than for a man to fabricate such evidence, for the benefit of his descendants. (*e*) Yet the private books of a deceased rector or vicar are received, in favour of his successor. (*f*) The observations of Sir Thomas Plumer, M. R., on this subject, will

Leases.

Books of rectors, &c.

his own books, and his own favour, does not constitute evidence of this sort, see Doe *v.* Vowles, 1 Moo. & R. 261; where Littledale, J., in rejecting such, expressed his opinion to be that the cases had already gone far enough; see Doe *v.* Barton, 9 Car. & P. 254; and S. P. see Meyrick *v.* Wakley, 8 Car. & P. 283, and 3 N. & P. 284, as to entries made by the surgeon of a poor-law union.]

(*a*) Clarkson *v.* Woodhouse, 5 T. R. 412, note; Rogers *v.* Allen, 1 Camp. 309; Newburgh *v.* Newburgh, 3 B. P. C. 553. [A counterpart, see Doe *v.* Pulman, 3 Ad. & Ell. 622. As to *primâ facie* evidence of lands being parish property, leases describing them as such, see Doe d. Higgs *v.* Terry, 5 Nev. & M. 556.]

(*b*) Manning *v.* Lechmere, 1 Atk. 453. [Entries of presentments in the books of a manor are no evidence of acts of ownership; Irwin *v.* Simpson, 7 Bro. P. C. 317.]

(*c*) [As in the cases Reg. *v.* Worth, Inhabitants of, &c., *vide supra*, p. 310, n. (*b*).]

(*d*) Rogers *v.* Allen, 1 Camp. 309; Barry *v.* Bebbington, 4 T. R. 514; Manning *v.* Lechmere, 1 Atk. 453; Pomfret *v.* Smith, 7 B. P. C. 169; Outram *v.* Morewood, 5 T. R. 121.

(*e*) See Pomfret *v.* Smith, 7 B. P. C. 169. [But, nevertheless, the coming out of the custody of the person who has paid the money may help: thus, where A. occupied lands from 1790 to 1815, but had ceased to occupy them before the time of his death; at his death, among his papers, receipts for rent of this land were found, in a series, from 1790 to 1804, signed by M. P., Senr., who died in 1806, and a similar series from 1806 to 1815, signed by M. P., Junr., who died in 1820; held, in ejectment for these lands, that these receipts were evidence of the seisin of M. P., Senr. and M. P., Junr.; Doe d. Blayney *v.* Savage, 1 Car. & K. 487.]

(*f*) [A bill being filed by a vicar for tithes, an account, given in, by a sequestrator, to the bishop, in the year 1600, containing a charge and discharge, is evidence for the vicar; Finch *v.* Messing, cited in Sharp *v.* Lee, 2 J. & W. 472. That a parson's receipts for tithes may be evidence for his successor, see Glynn *v.* Bank of Eng., 2 Ves. 43. That all receipts, &c., should come out of proper custody, *vide supra*, p. 186, n. (*f*), and see Doe *v.* Savage, 1 Car. & K. 487. The written statements of a former vicar, where the plaintiff claimed in right of the vicarage, held admissible in Doe *v.* Cole, 6 C. & P. 359; see also Doe *v.* Wainewright, 3 Nev. & P. 598, and Proctor *v.* Lainson, 7 C. & P. 629.]

Observations of Sir Tho. Plumer, M. R.

be sufficient without citing other authorities; "It is too late to argue upon that rule, or upon what gave rise to it; whether it was the *cursus scaccarii*, the protection extended to the clergy, or the peculiar nature of the property in tithes: it is now the settled law of the land. It is not to be presumed that a person having a temporary interest only, will insert a falsehood in his book, from which he can derive no advantage. Lord Kenyon has said that the rule is an exception; and it is so, for no other proprietor can make evidence for those who claim under him, or for those who claim in the same right, and stand in the same predicament. (*a*) But it has been the settled law as to tithes, as far back as our research can reach. We must therefore set out from this as a *datum*." He proceeds to decide that the rule applies to ecclesiastical corporations aggregate as well as sole, and expresses a strong opinion that it holds good also as to lay impropriators. (*b*) Other cases have extended it to the books of a lessee of a rectory, (*c*) or of a person employed as collector; (*d*) and to entries made by a vicar, though not in a regular account book. (*e*)

[224]

Extension of the rule.

(*a*) [See Doe *v.* Voules, *ut supra*, p. 310, n. (*b*).

The question being, whether the appointment of a curate belonged to the vicar or to the corporation; entries in old books of the corporation not admissible, as evidence, against the vicar; Att. Gen. *v.* Warwick, 4 Russ. 222.]

(*b*) Short *v.* Lee, 2 J. & W. 478. [In one instance, a case laid before counsel, on behalf of a bishop, was held to be admissible against his successor, on a question of presentation; see Meath, Bp. of, *v.* Winchelsea, M. of, 3 Bing., N. S., 183, and 3 Sc. 561.]

(*c*) Illingworth *v.* Leigh, 4 Gwill. 1618.

(*d*) Jones *v.* Waller, 3 Gwill. 847; [and see Finch *v.* Messing, *supra*.]

(*e*) Perigal *v.* Nicholson, Wightw. 63; but see the case. [The following are some of the cases relating to the use of terriers, &c., as evidence in tithe suits, viz., a terrier sans date, Hall *v.* Farmer, 2 Yo. & C. 145; parish overseers' accounts, Ward *v.* Pomfret, 5 Sim. 475; terriers Mytton *v.* Harris, 3 Pri. 19; but copy of a terrier was rejected, in Leathes *v.* Newitt, 4 Pri. 355; an ancient book, out of the bishops register, admitted, in Leonard *v.* Franklin, 4 Pri. 264, and Woolley *v.* Bromhead, 1 M'Cl. 321, S. P. 13, Pri. 500; old Receipts, in Bertie *v.* Beaumont, 2 Pri. 303, but such rejected, in Atkins *v.* Drake, 1 M'Cl. & Y. 213; vicar's books, in Walter *v.* Holman, 4 Pri. 171, and Miller *v.* Jackson, 1 Y. 965; ordinances and other ancient documents, in Fisher *v.* Graves, 1 M'Cl. & Y. 362; terriers, even in such cases, are not such conclusive evidence as to exclude all other; and as to use of ecclesiastical and Parliamentary surveys; see Atkins *v.* Drake, 1 M'Cl. & Y. 213; Cunliffe *v.* Taylor, 2 Pri. 329; that terriers alone are insufficient to prove a modus, see Lake *v.* Skinner, 1 Jac. & W. 20; use of terriers, see also Stuart *v.* Greenall, 9 Pri. 106; when conflicting terriers, see Willis *v.* Farrar, 2 Y. & J. 217; and (by the way) as to evidence of exemption from tithes, by having belonged to privileged orders, see Morton *v.* Scarlet, 2 Y. & J. 330; Elsley *v.* Donnisen, 2 Bligh, N. S, 94, S. C. 1 M'Cl. & Y. 1; Markham *v.* Smyth, 11 Pri. 126.]

Proof will be always required that the writer had authority to receive the money stated, (*a*) and is actually dead, (*b*) and that the document has been brought from some proper custody. (*c*)

Matters to be proved in all such cases.

Upon a principle very similar to that on which statements contrary to a man's own pecuniary interest are made evidence, admissions, which might be used against him on a trial, are also received. (*d*) This is given as the ground upon which entries by shopmen are admissible; but Mr. Phillipps very sensibly remarks upon this, "The circumstance of his thereby acknowledging the receipt of goods, which, it may be said, would be evidence in an action against him, seems to amount to little or nothing. It was the least he could say; to have said nothing at all would, as he must have known, necessarily lead to some inquiry." (*e*) However such entries have been admitted to a very great extent; that of a drayman to prove the delivery of beer; (*f*) of a tailor's servant to prove the delivery of clothes; (*g*)

Statements which might be used on a trial.

Entries in books by servants.

(*a*) [As steward or bailiff, as in Franks *v.* Cary, 2 Atk. 140; or as collector, as in Short *v.* Lee, 2 J. & W. 464.]

(*b*) Even though the paper was dated fifty years back, Manby *v.* Curtis, 1 Pri. 225; and see Short *v.* Lee, 2 J. & W. 468; Carrington *v.* Jones, 2 S. & S 135. *Et vide supra*, p. 250.]

(*c*) *Vide supra*, p. 186, n. (*f*). [The three proper repositories of terriers and vicars books are,—the parish chest,—the registry of the bishop,—and that of the archdeacon; Armstrong *v.* Hewatt, 4 Pri. 216; Potts *v.* Durand, 3 Aust. 789: but that an instrument purporting to be an endowment, without the seal, and another to be an inspeximus of that one, although under seal of the bishop, are not admitted, when coming out of private custody, *vide* S. C. Ibid.; and so see Atkins *v.* Hatton, 2 Aust. 387; Franklin *v.* Shilling, 3 Aust. 760.]

(*d*) [As to declarations by parties, defendants on the record, at law, see Reg. *v.* Adderlany East, 5 Q. B. 187, 1 Dav. & M. 324; 13 Law J., N. S., 9, since the stat. 3 & 4 Vict. c. 26. Where at the time of the sale of the plaintiff's goods, a conversation took place as to the subject of a demand of the defendants, which was the subject of his set-off, and otherwise barred by the statute of limitations; it was held that evidence of such conversation was improperly rejected, at the trial; Moore *v.* Strong, 1 Bing., N. S., 441, and 1 Sc. 367. In equity discovery is often prayed and enforced, of such conversations, to serve as evidence. Declarations of testator proveable in evidence against executor; Smith *v.* Smith, 3 Bing. N. C., 29, 3 Sc. 352, of executors, &c., before becoming so; Smyth *v.* Morgan, 2 M. & R. 257. Declarations made by the acceptor of a note, since deceased, in presence of the holder, admissible against him; Fritchley *v.* Williamson, 7 Jur. 335, C. Transfer of stock by an intestate into the name of himself jointly with that of the husband of his niece, accompanied by proof of his having said that it was his intention to give the husband the stock, at his death, in consideration of affection, &c., and that he had transferred it for that purpose (if not rejected by counter testimony) is sufficient proof of gift of such stock; George *v.* Howard, 7 Pri. 646.

As to declarations of debtors, with regard to the property in goods, &c., seized, &c.; see Roberts *v.* Justice, 1 Car. & K. 93; Prosser *v.* Guillim, Ib. 95; Stothert *v.* James, Ib. 121.]

(*e*) 1 Phil. on Ev 250.

(*f*) Price *v.* Lord Torrington, 1 Salk. 285; Holt, 300, 2 L. Raym. 873.

(*g*) Pitman *v.* Maddox, Salk. 690, where Lord C. J. Holt said, "it was

&c. The doctrine was pushed farther than Lord Hardwicke approved, in *Evans* v. *Lake*; (*a*) and still further, in *Hagedorn* v. *Reid*. (*b*) It has however been restricted closely to the handwriting of the shopman himself, or at least to writing
[225] recognized by him; (*c*) and it has been refused where the effect was not to charge the servant himself. (*d*) It has also been refused where the shopman was not dead but abroad. (*e*) It seems to have been to prevent inconvenience arising from some rule of this kind that the stat. 7 J. 1, c. 12, was passed; Lord Hardwicke says of it, "There was an opinon growing up that after a certain length of time a man's own shop books should be evidence for him, after the year; to prevent which was that act of Parliament made; as I have been informed, by Lord Raymond, upon consulting him." (*f*) Lord C. J. Holt, held that although that statute says a shop book shall not be evidence after the year, &c., yet it is not of itself evidence within the year. (*g*)

Stat. 7 J. 1, c. 12, as to shop books.

Principle unsettled.

The principles however, remain, (at least in the Courts of Equity,) very much unsettled. In *Barker* v. *Ray* (*h*), a question was not decided whether the declarations made by a woman, both before and after her husband's death, are admissible to show that he was not tenant in fee, but that on a certain event the lands were to go over to another branch of the family. The authorities, most elaborately collected by Mr. Evans, are given in a note, and Lord Eldon is reported to have said,

as good evidence as the proof of a witness's hand to an obligation."

(*a*) Bull. N. P. 282, 2 Ves. 43.

(*b*) 3 Camp. 379; there the entry by a deceased clerk of a merchant, in a letter book, of his having sent a license, was received; and see Pritt *v.* Fairclough, 3 Camp. 305.

(*c*) Digby *v.* Stedman, 1 Esp. Rep. 327; [and see Braine *v.* Prim, 11 M. & W. 773, cited above, that the entry must have been made in the due course of the exercise of the duty of the person making it, and not whilst acting for another; of the former class of cases, see instances, in the Slane Peerage case, 5 Cl. & Fin. 23; and Doe d. Williams *v.* Lloyd, 1 Sc, N. S. 505; and (amongst many) of the latter, see Meredith *v.* Footner, 11 Mus. & W. 202, confining the statements admissible to those made within the scope of the implied authority; in Doe *v.* Stacey, 6 C. & P. 139, entries signed admissible, even if not in the writing of the agent.]

(*d*) Calvert *v.* Canterbury Archbp. of, 2 Esp. Rep. 646; and see Clark *v.* Bedford, Bull. N. P. 282.

(*e*) Cooper *v.* Marsden, 1 Esp. Rep. 2. [But it is not a sufficient objection, in such case, that the facts might be proved by testimony of persons still living; Middleton *v.* Melson, 5 M. & R. 264.]

(*f*) In Glyn *v.* B. of England, 2 Vez. 43.

(*g*) Pitman *v.* Maddox, Salk. 690.

(*h*) 2 Russ. 63.

"The cases satisfy me that evidence is admissible of declarations made by the persons who have a complete knowledge of the subject to which such declarations refer, and where their interest is concerned; and the only doubt I have entertained was as to the position—that you are to receive evidence of declarations where there is no interest. At a certain period of my professional life, I should have said that that doctrine was quite new to me. I do not mean to say more than that I still doubt concerning it."(*a*) There is however now, a decided inclination on the part of the Judges to receive it where it bears no suspicious appearances. (*b*)"

Dictum per Lord Eldon.

[226]

The case of *Wright* v. *Littler* (*c*) ought to be mentioned here: Lord C. J. Mansfield, (the rest concurring) admitted the dying declaration of a subscribing witness that "he had forged the will in question; because the account was a confession of great iniquity and he could be under no temptation to say it but to do justice and ease his conscience."(*d*) But the argu-

Dying declarations.

(*a*) [Where the wife ordinarily conducted the husband's shop-business, (of a grocer, he being in service,) although her admissions, as to any matters relating thereto, would be evidence against him; yet her statements, as to the terms of the tenancy, being of an antecedent contract, could not be received; as not within the scope of her implied authority; Meredith *v.* Footner, 11 Mees. & W. 202. When the defendant's wife delivered the amount to a witness, to carry to the plaintiff, in payment for sheep, for which the action was brought; held that her declaration was admissible, in support of a plea of payment; Walters *v.* Lewis, 7 C. & P. 344. Evidence of declarations of the wife, respecting her advancement, made during her first coverture, held to be admissible against the second husband; and proofs of declarations of a husband, because against his interest; *secus*, those of the father; Fawkner *v.* Watts, 1 Atk. 437. Evidence of declarations of a wife, as to money raised by a mortgage of her estate, see in Cluett *v.* Hooper, 1 Ves. jun. 173. The purchase, by a father, of shares in a joint stock bank, in the name of his son, held, under the circumstances, not to be an advancement for the son: and as to evidence of declarations coupled with acts, see Scawin *v.* Scawin, 1 Yo. & Co. 65; and see also George *v.* Howard, 7 Pr. 646, cited fully above, p. 313, n. (*d*).]

(*b*) See Doe d. Petteshall *v.* Turford, 3 B. & Ad. 890; and the cases cited there. [Lloyd *v.* Wait, 1 Turn. & Phil. 61. And yet see the late case of the Sussex Peerage, 11 Cl. & Fin. 85, cited above; the limitation of declarations to cases there stated. When one has made an entry, charging himself, and is since deceased, it is not necessary to show that he had a knowledge of the fact stated; the absence of the knowledge affecting the weight only, not the admissibility of the evidence; Crease *v.* Barrett, 1 Cr., M. & R. 925.]

(*c*) 3 Burr. 1244, 1 Bl. Rep. 345.

(*d*) "Have I not hideous death within my view?—
What, in the world, should make me now deceive,
Since I must lose the use of all deceit?
Why should I then be false, since it is true
That I must die here, and live hence by truth?"
Shak. K. John, Act V., sc. 4.

ments then used by counsel put it on another footing, since expressed in these words by Mr. Justice Bayley; "He must have been called as a witness if he had been alive, and it would then have been competent to prove, by cross-examination, his declarations as to the forgery." (*a*) The former principle makes this a solitary exception to the rule which confines evidence of dying declarations to cases of homicide: the latter is to a certain extent sounder, but if taken alone would let in confessions of subscribing witnesses though not on the point of death. (*b*)

III. Questions of Pedigree; statements of deceased relations, &c.

Thirdly; Questions of Pedigree introduce a species of evidence which forms another exception to the inadmissibility of Hearsay, and of which the chief characteristic (*c*) is its *undesignedness*. (*d*) The information respecting their family which, in ordinary life, persons have received from the generations preceding them,—the memorials which they register in Bibles (*e*) or inscribe on tombs, (*f*)—even casual expressions in a familiar letter or a will, (*g*)—afford proofs which place such facts as are contained in pedigrees, beyond a reasonable doubt. (*h*) They

[227] are also frequently, if not generally (in modern days), (*i*) the

And yet it has been observed, by a learned Judge, whose experience is not slight in such matters, "Although the legal sanction to a dying declaration is equivalent to that of an examination on oath, yet the opportunity of investigating the truth is very different; and therefore the accused is entitled to every allowance and benefit he may have lost, by the absence of the opportunity of more full investigation." (*per* Sir Edward Hall Alderson, B., in) Ashton's Case, 2 Lewin's C. C. 147.]

(*a*) In Doe *v.* Ridgway, 4 B. & A. 55; and Lord Ellenborough speaks to the like effect, citing also another case, in Aveson *v.* Kinnaird, 6 East, 195.

(*b*) [On an indictment for murder of A., by poisoning, the declaration of B., who had since died by the same cause, held admissible; Reg. *v.* Baker, 2 M. & Rob. 53. Where the person declaring has any hope of his recovery, however slight, his declarations are inadmissible; see (amongst other cases) R. *v.* Hayward, 6 C. & P. 158. And see the cases in Stark. on Ev., 3rd. ed. p. 365, and App. 1301. As to declarations made by persons whilst wholly or partially overcome with liquor; see R. *v.* Spilsbury, 7 C. & P. 187. The fact affects the credibility rather than the admissibility of such.]

(*c*) [Or test, as to admissibility and weight.]

(*d*) It will be remembered that Paley's elaborate argument in the *Horæ Paulinæ* is based upon this principle.

(*e*) [Prayer Books, or any other such books, *vide inf.* p. 319, n. (*e*), *et* n. (*f*).]

(*f*) [Rings, broaches, or the like.]

(*g*) [See Huntingdon's Peerage case.]

(*h*) [As to the (so called) Non-parochial registers, see stat. 3 & 4 Vict. c. 92, but see s. 6 and s. 9, referring to s. 18 and 19, qualifying the admissibility of such greatly; and stat. 6 & 7 Wm. 4, c. 85 and 86, as to marriages, and registration of births, deaths, and marriages.]

(*i*) "Perhaps while the feudal tenures prevailed with the ancient inquisitions, as inquisitions *post mortem*, opportunities of establishing descents were afforded

only evidence attainable, for "it would be impossible to establish descents according to the strict rules by which contracts are established and subjects of property regulated." (*a*) It would, therefore, be unreasonable to reject them, though certainly the vague traditions preserved among distant relations of wealthy families often raise unfounded hopes, and lead to profitless expense. (*b*)

Ground of admission of hearsay as to pedigree matters.

The presumption of accurate knowledge on the part of the speaker with regard to the facts asserted, rests on the interest, pecuniary and general, which every man must be supposed to take in knowing the connections of his family. (*c*) Therefore although the rule applies strictly to hearsay of deceased *relations*, (*d*) Lord Erskine considered Baron Graham to have decided wrongly, in excluding the declarations of a husband, the head of the family, respecting the legitimacy of his wife. (*e*) In general it is necessary to show how the consanguinity exists, unless the statement itself supplies the fact: (*f*)

much superior even to the modern means by the register of births and baptisms. The heads of families upon those occasions made solemn declarations; which were matters of record, and threw great light upon questions of inheritance;" Lord Erskine, C., in Vowles *v.* Young, 13 Ves. 143. It is said in Skinner, 623, "Heralds' Books are allowed to prove a pedigree: yet this is because they have not better evidence; and this is their proper business about which they are employed, and therefore there is some credit given to them, but they do not deserve much, because they are negligently kept." But better evidence may often be procured at the Heralds' College; because it is customary with them, on registering pedigrees, to obtain the signatures of individuals to verify them. They admit as sufficient evidence for their purpose, the statement of a living individual respecting the marriage and deaths of his grandfather and grandmother, and the births, as well as the marriages and deaths, of all the generations descended from them.

(*a*) Vowles *v.* Young, 13 Ves. 143. [Traditionary evidence, in matters of pedigree, is not wholly to be rejected, although shown, in some particulars, to be erroneous; Monkton *v.* Att. Gen., 2 Russ. & M. 147, S. P. Johnston *v.* Todd, 5 Beav. 597, S. P. Davis *v.* Selby, 12 Law J., N. S. 506.]

(*b*) [And yet, on the other hand, as was the case, in the Hastings family, as to the claim to the Huntingdon Peerage, a mere tradition may serve to induce a search, leading to the highest honours; see Bell's interesting Account of the recovery of the Huntingdon Peerage.]

(*c*) [So to show (in a question of pedigree) that the family had relatives residing at a particular place, evidence may be given of declarations, by a member of the family, since deceased,—that he was going to visit his relatives at that place; Rishton dem. Nesbiten, 2 M. & Rob. 554.]

(*d*) Johnson *v.* Lawson, 2 Bing. 86. [Therefore traditions and declarations as to legitimacy, made by popish priests in Ireland, were rejected, in Carey *v.* O'Shannery, 7 Jur. 1140, Pr. Ch.]

(*e*) Vowles *v.* Young, 13 Ves. 140. [With due deference, however, to the opinion of Lord Erskine, *semble*, a man being no *relation* of his wife, Graham, B., was right.]

(*f*) [Tradition, even upon matters of pedigree, must be from persons having such a connection with the party, that it is natural and likely from their domestic habits, that the parties declaring

[228]

for "if a person says that another is his relation or next of kin, it is sufficient,—without stating the particular degree, which perhaps he could not tell if asked." (*a*) In *Monkton* v. *Atty. Gen.*, Lord Brougham decided, that "having once shown a person to be a member of a family, by matter *dehors*, you may admit his declaration as to the relationship of any other member of that family with any other, or as to the question, (which comes to the same thing), whether a certain person is a relation of that family;" (*b*) but as there is a fallacy in the axiom on which his Lordship's arguments are founded, the authority of the case is questionable. (*c*)

Inscriptions on tombstones, &c.

Inscriptions upon tombstones are admitted, because it must

were speaking what they thought true and that they could not be mistaken; upon which principle it is, descriptions in wills, monuments, Bibles, &c., are admitted; Whitelocke v. Baker, 13 Ves. 511. And so declarations of relations is evidence of pedigree; but not conclusive, without showing on what occasion, what lead to them, &c.; Walker v. Wingfield, 18 Ves. 443. Upon a similar principle the effect, in evidence, of an extract from the register of baptism of a child, in the Ecclesiastical Court, said to be only to prove an acknowledgment by the parties, that the child so baptised was theirs; Woods v. Woods, 2 Curt. 523; and (by the way) *semble*, where the declarant is under a liability consequent on the kinship, as in the relationship of parentage, &c. it is also a declaration against interest.]

(*a*) 13 Ves. 147.

(*b*) 2 Russ. & M. 158; but see Roe d. Thorn v. Lord, 2 Bl. Rep. 1099, and several old cases there cited.

(*c*) [The declarations of an illegitimate child, as to members of the family of his reputed father, have been held not within the rule, and so rejected; Doe v. Barton, 2 M. & Rob. 28. It may be observed, that on a question of pedigree, witnesses cannot be received to prove the declarations of a relative whose deposition is read; Gordon v. Gordon, 3 Swanst. 465. Where, in a pedigree case, the object is to connect A. with C., after proving that B., a person deceased, was related to A., it is competent to give in evidence declarations by B., in which he claimed relationship to C.: but, notwithstanding Lord Brougham's strange blunder, since the relations on one's mother's side and those on one's father's, are both relations of ours, but not necessarily related to each other, it does not follow that such prove A. to be related, by blood, to C. A paper in the handwriting of B., found in his repositories after his death, and purporting to give a genealogical account of his own family, of which he represented C. to be a member, is admissible for the same purpose; though never made public in the lifetime of B., and though erroneous in various particulars, and professing to be founded chiefly on hearsay. As to the nature and amount of the evidence, upon which the Court will direct an issue, to investigate a title, depending on a question of pedigree, see Monkton v. Att Gen., 2 Russ. & M. 147. A written pedigree, coming from the proper custody, relating to the descent of a person, and signed by him, and purporting to bear date, A.D. 1733, admitted in evidence, as a recognition by him of his family descent; though it was written on, "collected from parish registers, wills, monumental inscriptions, and family records and histories," and on the face of it went back to (what seemed) a *fabulous* period! Davis v. Selby, 12 Law J., N. S. 506, Exch. Chamb. A genealogical narrative in the handwriting of a person relating to his own family, how far admissible, to prove kinship to him, after his decease, see also Robson v. Att. Gen, 10 Cl. & Fin. 471. A pedigree, compiled by one member of a family and endorsed as true by another, is admissible in evidence; Davis dem. Lowndes, ten. 7 Scott, N. R. 141.]

be supposed that the relations of the family would not permit an inscription without foundation, to remain: (*a*) so engravings upon rings are admitted, upon the presumption that a person would not wear a ring with an error upon it. (*b*) "Why is it," says Lord Brougham, "that a pedigree hung up in the family mansion is good evidence, although the person who made it is unknown, and it is not proved, by matter *dehors* the document itself, to have been connected with the family? Simply because of its being hung up in the mansion; where, the presumption is, it would not be suffered to remain, if the whole of the family did not more or less adopt it, and thereby give it authenticity." (*c*) A statement made in a Bible has no intrinsic superiority over any other writing; but, as Lord Redesdale says in the *Berkeley Peerage case* (where the point was incidentally discussed,) "The circumstance of an entry being in a family Bible to which all the family have access, gives it that solidity which it would not have if made in a book which remained in the exclusive possession of the father." He adds, "Entries in family Bibles have therefore become common evidence of pedigree in this country; and in America, where there is no register of births and baptisms, hardly any other is known." (*d*) Entries in Prayer Books are almost as common among the poor, as in Bibles, and of course the same reasoning is applicable to them, (*e*) they are frequently produced in settlement cases. (*f*)

Pedigree hung up in mansion;

entries in a family Bible, &c.

[229]

(*a*) [A copy of a mural inscription in a church, made prior to the time, when, by repairing the church, the original was effaced, although only made in pencil, and afterwards traced over with ink, was held admissible, on a question of pedigree; Slaney *v.* Wade, 7 Sim. 595; and see S. C. (on appeal) 1 Myl & K. 338. An instance of a case of a lost tombstone, see Fitzwalter Peerage case, 10 Cl. & Fin. 193.]

(*b*) Lord Erskine in Vowles *v.* Young, 13 Ves. 144.

(*c*) In Monkton *v.* Att. Gen., 2 Russ. & M. 163. [But a pedigree made by a person, with a view to a suit respecting property, is not receivable, in a claim of peerage by his son, to prove his descent; nor is a case stated for the opinion of counsel, produced from the family papers of a distant relation of the claimant; Slane Peerage, 2 Cl. & Fin. 23, and see Edwards *v.* Harvey, Coop. 39. A pedigree, purporting to be thirty years old, must be taken to have been made at the period when dated; Davis *v.* Selby, 12 Law J. 506, N. S. A pedigree should come out of proper custody, as the family papers; Davis dem. Lowndes, tem. 7 Sc. N. R. 141. As to custody, *vide supra*, p. 186, n. (*f*).]

(*d*) 4 Camp. 421.

(*e*) It may be worth mentioning, that such books are frequently produced with the title pages torn out, to conceal the date; which however, in a Book of Common Prayer, may, of course, be readily ascertained, within a few years, by referring to the prayers for the royal family. [And in a Bible, in some degree, by comparison of type, paper, &c.; to give other tests would but suggest fraud.]

(*f*) [Entries in a family missal are

What may be thus proved.

The facts which may be proved, by evidence of this nature, are strictly those which a bare pedigree contains; that is to say,—who was related to whom,—by what links the relationship was made out,—whether it was a relationship of consanguinity or of affinity only,—when the parties died,—or whether they are actually dead,—everything, in short, which is strictly speaking matter of pedigree." (*a*) Lord C. J. Tindal even rejected inscriptions and declarations as to the age of a person deceased; but this, (a *nisi prius* decision on the trial of an issue) was vigorously controverted before Lord Brougham, who, after consulting with Mr. Justice Parke and Mr. Justice Littledale, expressed a strong opinion to the contrary. A case was drawn up for the opinion of the King's Bench, but the cause was compromised. (*b*) The *place* of birth has been decided not to be a matter of pedigree, and the father's declarations on that point to be inadmissible. (*c*) Perhaps the strongest reported case is one in which the oath of an elderly witness that she had heard, in her family of the death of a relation, who had gone to the West Indies, but had never heard of his having been married, was taken as proof that he had died without issue. (*d*)

admitted as evidence of births, deaths, and marriages of members of a family; Slane Peerage case, 5 Cl. & Fin. 23;] indeed entries in any religious book, treated by deceased owners as important family memorials, held admissible; and that although it may not appear by whom made; Hood *v.* Beauchamp, 8 Sim. 26; but entries in an old Prayer Book, under peculiar circumstances, were rejected in the Tracey Peerage case, 10 Cl. & Fin. 154; as to statements in a will, where a testator bequeaths a legacy to a person, and designates the legatee as a "relation," it is to be presumed that he was a legitimate relation; Slane *v.* Wade, 7 Sim. Ch. 595; S. C. affirmed, 1 Myl. & C. 338; but the mere probate copy of a Will is inadmissible, as evidence of a declaration, by the testator, of a matter of pedigree; Doe *v.* Ormerod, 1 M. & Rob. 466. Upon an issue directed, as to the plaintiff's title, as heir-at-law; held that a deed, showing the fact of property having been enjoyed by a party, as the son of particular individuals, might be admissible to prove that fact; but *semble* not for the purpose of using the recitals as evidence of pedigree; Slaney *v.* Wade, 1 Myl. & K. Ch. 338.]

(*a*) *Per* Lord Brougham, in Att. Gen. *v.* Monkton, 2 Russ. & M. 156. [But Lord Brougham seems to forget that affinity, if any at all, is but a very slight kind of relationship, and should be very widely distinguished from relationship by blood; *ut vide supra*, p. 317, n. (*e*).]

(*b*) Kidney *v.* Cockburn, 2 Russ. & M. 167. Higham *v.* Ridgway, 10 East, 109; Herbert *v.* Tuckall, T. Raym. 84, and Ryder *v.* Malbone (unreported), were cited as authorities in favour of the evidence.

(*c*) R. *v.* Smith, 8 East, 541.

(*d*) Banning *v.* Griffith, 15 East, 293. In an old *nisi prius* case the assertions of two relations being contradictory, circumstantial facts contained in their statements were listened to. Anon. 12 Vin. Abr. Ev. T. b. 91.

[230]

Statements made *post litem motam*;

Statements, however, the chief value of which depends upon their disinterestedness, or their undesignedness, are naturally liable to great suspicion; and under certain circumstances it has been thought the safest course to exclude them altogether. (*a*) As Lord Eldon says, "They are admitted upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth." (*b*) When therefore a suit has been commenced, or even a controversy arisen, the probability of an inclination in favour of one or the other of the litigants is so great that hearsay of subsequent date, [in pedigree cases as in those relating to prescription,] has never been received. Such at least was the opinion of all the Judges, except Baron Graham, in the *Berkeley Peerage case*. (*c*) Mr. Justice Lawrence answered that learned Judge in a speech of some length, from which the following are passages. "Notwithstanding what has been said in the case of *Stevens* v. *Moss*, (*d*) I cannot think that Lord Mansfield would have held that declarations in matters of pedigree, made after the controversy had arisen, ought to be submitted to a jury. They stand precisely on the same footing as declarations on questions of rights of way, rights of common, and other matters depending upon usage; and although I cannot call to mind the ruling of any particular Judge upon the subject, yet I know that according to my experience of the practice, (an experience of nearly forty years,) whenever a witness has admitted that what he was going to state he had heard after the beginning of a controversy, his testimony has been uniformly rejected."—"Although the exclusion of declarations made in the course of the controversy may prejudice some individuals, it is better to submit to this inconvenience than expose Courts of Justice to the frauds which would be

As to the weight of this kind of evidence, see some observations on Johnston v. Tood, 5 Beav. 597.]

(*a*) [In the Slane Peerage case, 5 Cl. & Fi. 23. So on a question as to legitimacy, declarations of the parents after the birth of the child, said to have little weight; Sherborn v. Napier, 2 Ridgw. P. C. 224.]

(*b*) In Whitelock v. Baker, 13 Ves. 514.

(*c*) 4 Camp. 411.

(*d*) Cowp. 591.

practised upon them were a contrary rule to prevail. That this is not an imaginary apprehension, will occur from what happened at the Bar of your Lordships' House, in the *Douglas* and *Anglesea* causes—in the first of which, fabricated letters were given in evidence before your Lordships—and in the second, false declarations. Notwithstanding the danger of incurring the penalties of the crime of perjury, there is scarcely an assize or sittings in which witnesses are not produced who swear in direct contradiction the one to the other; and it may be feared that persons, who have as little regard to truth, may be induced to make false declarations, when they run no risk of punishment in this world, as no use can be made of their evidence till after their death. We know that passion, prejudice, party, and even good will, tempt many, who preserve a fair character with the world, to deviate from truth, in the laxity of conversation. Can it be presumed that a man stands perfectly indifferent, upon an existing dispute, respecting his kindred? His declarations *post litem motam*, not merely after the commencement of the lawsuit, but *after the dispute has arisen*, (that is the primary meaning of the word *lis*), (*a*) are evidently more likely to mislead the jury than to direct them to a right conclusion, and therefore ought not to be received in evidence." Baron Graham had relied upon the apparent absurdity which arose in the case before them, that the depositions in a suit for perpetuating testimony should not be evidence, except against the parties to that suit, or those claiming under them, while simple declarations if they had been made without instituting a suit, would have been evidence against the world; "the witness was compelled to state what he knew upon the subject, and it seems what he then declared must be rejected, because he spoke by compulsion, under the sanction of an oath; although his voluntary effusion, upon the same subject, would have been admitted without question." But the other Judges very justly considered the objection to apply still more strongly to a deposition, because it was professedly

(*a*) He quotes, "Philosophi ætatem in *litibus* conterunt."—Cic.

produced, by the witness of one party, for the express purpose of proving the point in dispute. He also animadverted on the danger of fixing so indefinite a period as "the origin of a controversy;" and the impossibility of determining whether the [232] parties did or did not contemplate a suit at any given moment of time. This is a real difficulty, as far as it goes. (*a*) But, according to most of the cases, some demonstration of an intention to litigate must be shown; the existence of a state of circumstances, out of which a controversy may be expected to arise, is not sufficient. Lord Mansfield speaks with approbation of "advice given to a father and mother to make attested declarations, in writing, under their hand, of the precise time of the birth of a bastard *eignè*, and their subsequent marriage; to prevent controversy in the family, touching the inheritance." He adds, "If the credit of such declarations is impeached, it must be left to the jury to judge of." (*b*) The third question in the *Berkeley Peerage case* is very similar; and there the Judges, while they held the evidence admissible, added "but with strong circumstances of suspicion on account of its particularity." (*c*)

made with a view to a controversy;

It is a nicer question when the assertion or writing proceeds from a person interested; and *non constat* that he may not have been collecting evidence, with a view to legal proceedings, or making it for the future benefit of others. This was the objection raised in one case, (*d*) where persons, claiming as next of kin of a gentleman who had died in India leaving a will partly void, produced memoranda of pedigree, in the handwriting of a relation of theirs, connecting himself with the testator. The Vice Chancellor (Sir A. Hart) thought the objection valid; but Lord Brougham, on appeal, said, "Show me that the pedigree in question was prepared with that view,—bring it within the rule either of *Whitelock* v. *Baker* or of the *Berkeley*

(*a*) [Accordingly declarations, on matters of pedigree, made by members of a family, after the state of facts had arisen, on which the claim was founded (which, for that purpose, is deemed the commencement of a *lis mota*,) held to be inadmissible, even after the death of the declarants; Walker *v.* Beauchamp, 6 C. & P. 560; and Sussex Peerage Case, 11 Cl. & Fin. 85.]

(*b*) In Stevens *v.* Moss, Cowp. 594.

(*c*) 4 Camp. 418.

(*d*) Monkton *v.* Att. Gen. 2 Russ. & M. 147.

Peerage case,—prove that it was made *post litem motam*, (not meaning thereby a suit actually pending, but a controversy existing,) and that the person making, or concocting, the declaration took part in the controversy,—show me even that there was a contemplation of legal proceedings, (*a*) with a view to which the pedigree was manufactured,—and I shall then [233] hold that it comes within the rule which rejects evidence fabricated for a purpose, by a man who has an interest of his own to serve." (*b*)

Made by a person in *pari casu*.

However exactly *in pari casu* with the party the person from whom the evidence proceeded may have been, that alone is not a fatal objection. (*c*) Lord Brougham, after mentioning a peerage case (*d*) where the declarations of a deceased husband were given in evidence for his son, (though if the son was entitled to the peerage then the husband ought to have been a peer likewise,) proceeds, "It is perfectly settled, both upon reason and authority, that the rule cannot be so far restricted as to exclude evidence, on account of the bias supposed to operate on the person making the declaration, in consequence of his being in the same situation, touching the matter in contest, with the party relying upon that declaration."

Not contemporaneous.

An attempt was made in the same case to support another objection, that the declaration ought to be contemporaneous, but this was held not to affect its admissibility. (*e*)

It is obvious that these and many other arguments peculiar to each case in which Hearsay is tendered, may be urged upon the point of credibility; and when the facts are such that the equity Judge will venture to decide upon them himself, it is often better to trust to his experience and discretion, than captiously to object to the reception of such evidence. In Scotland

(*a*) [As in the Slane Peerage case, 5 Cl. & Fin. 23.]

(*b*) [And see Slaney *v.* Wade, 1 Myl. & K. 338. As noticed before, it has been held that a document (relating to question of pedigree, and) purporting to be more than thirty years old, was to be taken to have been made at the period when dated; and that period being *ante litem motam*, it was therefore, *primâ facie*, to be taken to have been made *ante litem motam*; Davis *v.* Selby, 12 Law J. N. S. 506, Exch. Ch.]

(*c*) [Even prior to the late statute, admitting the testimony of persons interested, not being the parties themselves, in their own cause and favour.]

(*d*) This was referred to by Lord Tenterden in Doe *v.* Turner, 1 Ry. & Mo. 142.

(*e*) Monkton *v.* Att. Gen. 2 Russ. & M. 157.

and in other countries where the same individuals decide upon the facts as upon the law, and in our English common law Courts when affidavits are submitted to the Judges, hearsay evidence is admitted without much scruple. (*a*) The cases in which the subject is one of importance to a barrister in the Courts of Equity, are principally those in which issues are sent to be tried before a jury. (*b*)

(*a*) See 4 Camp. 415.

(*b*) [In all cases of hearsay evidence, it is obvious that the identity of the persons, alleged to have made the entries or declarations, sought to be used in evidence, must be first fully, as well as properly, proved. Declarations, sought to be given in evidence, as those of the plaintiff, being only shown to have been made by a person at the plaintiff's house, without further evidence of identity; it was held, that the admissibility was wholly a question for the Judge, and that he properly rejected them; Corfield *v.* Parsons, 1 Cr. & M. 730; and 3 Tyrw. 806.]

[INCOMPETENCY.]

[*In Suits, &c., commenced since the* 22*nd Aug.* 1843.]

Incompetency to give any evidence,

[Before entering upon the subject of incompetency generally, it seems convenient, in this place, to set forth the later statute on the subject; which statute modifies all those previously received rules of the Law of Evidence, by which persons, offered as witnesses, might be excluded, by reason of incapacity from crime or interest, from giving evidence, either in person or by deposition.]

from crime or interest.

[*The Statute alluded to is the* 6 & 7 *Vict. c.* 85, *entituled, "An Act for improving the Law of Evidence," and was passed on the 22nd August,* 1843; *and is, as to the parts relevant to our present subject, as follows:—*

Preamble.

s. 1. Whereas the inquiry after truth in Courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony: (*a*) Now therefore be it enacted, &c., that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime (*b*) or interest (*c*) from giving evidence, either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any Court, or before any Judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any

No person to be excluded by reason of incapacity from crime or interest.

(*a*) [The reader will notice this principle here laid down, as one henceforward to be assumed, and (*e. g. infra*, p. 333, n. (*c*), *et* p. 336, n. (*d*),) sometimes expressly referred to. And see next page, n. (*e*).]

(*b*) [As to which, chiefly with regard to suits commenced before the passing of this Act, *vide infra*, p. 333, *et seq.*]

(*c*) [*Vide infra*, p. 336, *et seq.*]

crime or offence: provided that this act shall not render competent any party to any suit, (*a*) action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively: (*b*) provided also, that this Act shall not repeal any provision in a certain Act passed in the session of Parliament holden in the seventh year of the reign of his late Majesty, and in the first year of the reign of her present Majesty, intituled "An Act for the Amendment of the Laws with respect to Wills:" (*c*) provided that in Courts of Equity any defendant to any cause pending in any such Court may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions; (*d*) and that any interest which such defendant so to be examined may have in the matter or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit (*e*) of such defendant as a witness.

Act not to render any party to any suit, &c., or &c., competent.

Act not to repeal any provision in Wills Act.

In Courts of Equity, defendants examinable; and interest an exception to credit only.

* * * * *

s. 3. And be it enacted, that nothing in this act shall apply to or affect any suit, action, or proceeding brought or commenced before the passing of this Act.

Act not to apply to suit commenced before;

s. 4. And be it enacted, that nothing in this Act shall extend to Scotland.]

nor extend to Scotland.

(*a*) [But, as to defendants in suits in Equity, see the provisions below.]

(*b*) [This privilege of married persons will be discussed below, p. 341, *et seq.*; and it is observable that it is here fully recognised.]

(*c*) [Which Act *vide supra*, p. 182, *et seq.*, where the provisions appear.]

(*d*) [As to which practice of the Courts of Equity, *vide infra*, p. 337, *et seq.*]

(*e*) [See the preamble of this Act, last page, and n. (*a*). As to Impeachment of Credit, *vide supra*, p. 204, *et seq.*]

[234]

SECTION IV. (*a*)

WITNESS INCOMPETENT. (*b*)

THE incompetency of the witness [especially as to suits, &c. commenced prior to the passing of the late statute] is a very comprehensive ground, for the exclusion of evidence. (*c*) It is of several degrees; either general,—or with reference to the pending suit or issue,—or with reference to the particular question or line of examination.

How ascertained; —at law by examination on the *voire dire*.

In trials at law [being before a jury] it is often advantageous to expose the incompetency of a witness, by examining on the *voire dire* before he is sworn in the cause; because what has once been listened to, as evidence, can never be entirely discarded from the mind, [by the jury]; but in [Courts of] Equity this caution [seems] unnecessary; because depositions may be suppressed before they are [even] seen by the Judge. (*d*) The old rule [at law,] made competency unimpeachable after the oath in the cause had been administered, [to the person offered;] but on the *voire dire* [allowed] a series of desultory questions, [to be put;] the answers to which were to be taken as undeniable truth. This however for the sake of convenience, has been long ago relaxed in practice; and now if the incompetency of a witness is detected at any time during the trial, the jury are

(*a*) [Here it may be as well again to remind the reader, that although, in general, the rules of evidence in equity differ not from those used at law, yet in particular cases, such as those of fraud or trust, the Courts of Equity use large discretion; see Man *v.* Ward, 2 Atk. 228, *et supra*, p. 4, n. (*a*). See also Lupton *v.* White, 15 Ves. 443.]

(*b*) [Since by s. 3 of the stat. 6 & 7 Vict. c. 85, for Amending the Law of Evidence, "Nothing in that Act is to apply to or affect any suit, action, or proceeding brought or commenced before the passing of the Act," (the 22nd of Aug. 1843,) it is essentially necessary to state the law as it was. Consequently the Editor, in preparing this edition, has endeavoured to perfect the original text, by citation of relevant cases; and left to the reader, in his perusal of the whole of this section, to bear in mind the distinction made, as to fresh suits, by the statute alluded to.]

(*c*) [As to what persons were capable of being witnesses, at common law, and what not, see Co. Litt. 6 *a* and *b*.]

(*d*) [*Sed vide supra*, p. 212.]

directed to pay no regard to his testimony. (*a*) Lord Hardwicke is reported to have said, (sitting in Equity,) "There are two ways to prevent witnesses being received as evidence;—first, by proving them interested,—secondly, by examining them on a *voire dire*;—if you examine on a *voire dire* you cannot afterwards prove the party interested." (*b*) He was however probably speaking of the rule at common law; at least, the only time at which the process could be strictly applicable in Equity [would be] when a witness comes forward to prove exhibits *vivâ voce* at the hearing. (*c*) Anciently every set of interrogatories contained a question,—whether the witness was or not interested in the event of the suit, (the usual course of proceeding in every Court where the examination is conducted by written interrogatories); (*d*) but now the practice, when incompetency is suspected, is to file a cross-interrogatory; which will be answered at the usual time, immediately after the examination in chief. If this has been omitted in a country cause, and the commission has expired, the Court will, before publication, (on motion, supported by proper affidavits, explaining the cause of the omission, and declaring the entire ignorance of the party applying, and of his solicitor, as to what has been

[235] in Equity,

by cross-examination;

(*a*) See Needham *v.* Smith, 2 Vern. 464; as Lord Eldon expressed it, in Vaughan *v.* Worral, 2 Swanst. 400, "When after a witness has been cross-examined to the bone, on the last question, it appears that he has an interest in the suit, the Judge must say, that no attention could be given to his evidence." [And see Selway *v.* Chapell, 12 Sim. 113. And that, at law, an objection of incompetency may be taken against a witness at any time, during the examination, see Jacobs *v.* Leyborn, 11 Anst. 685; S. C. 1 Dowl. & L. 352.]

(*b*) Downing *v.* Townsend, Ambl. 593. [A party cannot examine his own witness on a *voire dire*; Plummer *v.* May, 1 Ves. 426.]

(*c*) [And now as Exhibits are made proveable by affidavit, *vide supra*, p. 147, even this occasion is wanting.] The Examiners or Commissioners might think it right to question a witness of whose competency, from tender age, or any other reason, they felt a doubt. [And it may be here mentioned that the statute alluded to above, has not made the testimony of an avowed atheist admissible in evidence. Indeed, of such an unhappy individual the difficulty is,—first to know whether he is sane, and if that be believed, whether he is more knave or fool, or whether or not both. For surely one who really was an atheist, if consistent, could not wonder, or feel the least surprised, or hurt, if his fellow-men deemed him capable of lying to serve his turn; for, if not, he is a fool surpassing all experience. The fact is, the very avowal is most likely a lie, and every magistrate refuses to hear more.]

(*d*) Lord Eldon in Vaughan *v.* Worrall, 2 Swanst. 396. The practice in the Courts of Scotland, see Erskine on the Law of Scotland, Lib. 4, tit. 2, § 14. [That in the Ecclesiastical and other Civil Law Courts of England, see Rogers' Eccl. Law, tit. Evidence; and the forthcoming Digest of the Cases in the Court of Admiralty, &c.]

re-examination as to competency.

already sworn), issue a new commission, for a re-examination on the point of interest. (*a*) When the fact of interest is suspected from the depositions, or is denied by the answer to the cross-interrogatory, the Court may grant a further inquiry; (*b*) but whether this is to affect the competency of the witness, or his credibility only, (*c*) has been disputed. (*d*) Lord Hardwicke said "it might be reasonable to allow an examination, as to competency, *after publication*, where the objection to the competency arose from a matter that came to the knowledge of the party after the examination; and the proper way to apply for this would be, not by exhibiting articles, but by motion for leave to examine, in this matter, upon a foundation of ignorance at the time of the examination." (*e*) Upon an appeal from the Rolls, in 1704, it was objected to the evidence of a witness, (examined in the cause,) read at the former hearing, that he had since, by answer to a bill exhibited against him, confessed that in the day he was examined, the plaintiff gave him a bond, that if he recovered the land in question, he would convey part of it to the witness, &c.; by the opinion of Lord Keeper Wright, assisted by two Judges, this answer was ordered to be read. (*f*)

[236]

Examination as to competency, after publication.

An issue ordered.

And in a much later case, suspicions having arisen, that a witness, who had been examined, was interested; Lord Alvanley, M. R., (evidently after publication,) ordered an issue; in order that,

(*a*) Vaughan *v.* Worrall, 2 Mod. 322, 2 Swanst. 395; the other party was allowed to examine new witnesses, to disprove interest; but the whole expense of the commission was ordered to be borne by the party applying: and see Murray *v.* Shadwell, 2 V. & B. 401; where a defendant was made a witness by a co-defendant, and Leach said, *arg.* "The objection that the plaintiff, uncertain whether the defendant is interested, has a difficulty in cross-examining him, occurs in every case; a consequence of the imperfect mode of examining in this Court."

(*b*) See Purcell *v.* Macnamara, 8 Ves. 324.

(*c*) For examination on articles as to Credibility, *vide supra*, p. 204. [And for the mode of attacking the credit of a witness, in the Civil Law Courts, by an exceptive allegation; see Rogers' Eccl. Law, tit. Evidence, p. 391.]

(*d*) Mr. Justice Powell, in Needham *v.* Smith, 2 Vern. 464, thought it "a difference without colour of reason;" but Sir J. Leach differed from him in opinion, after examining the authorities, in Vaughan *v.* Worrall, 2 Mad. 322; and Mr. Maddock (2 Ch. Pr. 422) considers the distinction as established; on the appeal, in Vaughan *v.* Worrall, 2 Mad. 322, Sir S. Romilly, *arg.*, said, "The modern distinction, is that the proper time for examination to *competence* is before publication; but the exhibition of interrogatories to *credit* is permitted after publication;" and he cited cases.

(*e*) Callaghan *v.* Rochfort, 3 Atk. 643. [See Selway *v.* Chapell, 12 Sim. 113. And in the Court of Arches, see Reed *v.* Everard, 3 Curt. 337.]

(*f*) Needham *v.* Smith, 2 Vern. 463.

upon his examination in the Court of Law, questions might be put to him to discover his interest; though his Lordship said he thought the Court might order an interrogatory to be exhibited to him, in the nature of a *voire dire*. (*a*)

Examination in the nature of a *voire dire*.

If the incompetency appears on the face of the depositions, whether in the examination or cross-examination, the whole of them are bad; and the objection may be taken at any time previous to their being read. (*b*)

[237]

I. Some classes of persons labour under a general incompetency.

I. General incompetency.

There would obviously be an absurdity in receiving the attempt of an idiot, (*c*) or of a lunatic, when his mind is in an unsound state, to give his testimony; whether a commission has been actually taken out against him or not. But "a lunatic may be a witness *in lucidis intervallis*." (*d*)

Idiotcy. Lunacy.

There would be a similar absurdity in admitting the evidence of a very young child. The civil law fixed a certain age as the limit of competency, and so at one time did our own law; (*e*) but it has lately been far more wisely determined that a child, however young, who understands the nature of an oath shall be allowed to give his testimony. (*f*) Such a question, however, rarely arises except in criminal cases.

Infancy.

Until so lately as a century ago, it was a ground of objection, in civil causes, in the Courts of Scotland, that a witness was a

In Scotland, female sex,

(*a*) Stokes *v.* M'Kerral, 3 B. C. C. 228.

(*b*) Perigal *v.* Nicholson, Wightw. 64; Scott *v.* Fenwick, 3 Gwil. 1255. [And it may be useful to observe here, that in one case, where depositions were rejected on these grounds, the Court of Exchequer gave the costs of them, independently of the result of the cause. Petch *v.* Dalton, 6 Price, 232.]

(*c*) [But with regard to deaf and dumb persons they may now be examined as witnesses; see analogous cases, such persons being charged with offences; 1 Hale, 34, R. *v.* Pritchard, 7 C. & P. 303, and R. *v.* Dyson, Ib. In a recent case, at the Rolls, the examination of a married woman, apart from her husband, before parting with a fund in Court, she being deaf and dumb, was by medium of one whose affidavit testified to his having explained the deed to her, and her having consented to, as well as understood it. An attesting witness having become blind, may, nevertheless, be an essential witness; Crank *v.* Frith, 2 Moo. & R. 262; S. C. 9 Carr. & P. 197. A deed executed by a blind person, through the intervention of notaries, good under the Scotch Acts,; see Reed *v.* Baxter 7 Cl. & Fin. 261.]

(*d*) Com. Dig. Testmoigne, A. 1. [As to the general proof of insanity of mind, and as to lucid intervals, see Hall *v.* Warren, 9 Ves. 611; White *v.* Wilson, 13 Ves. 88.]

(*e*) R. *v.* Travers, Strange, 701; De Grey, C. J., in R. *v.* Dunnell, East, P. C. 442.

(*f*) This was decided by all the Judges in 1779, East, P. C. 444; see 4 Bl. Com. 214; Smith *v.* French, 2 Atk. 245.

when other evidence procurable;

female when other evidence might have been obtained; a peculiarity for which even Scotch writers seem at a loss to account. It is even now doubted whether, in that country, a female would be a good witness to a deed, or solemn legal document. (*a*) This point might, by chance, be material to be considered by an English barrister. [But in the Courts of England, for a witness, being of the female sex is no disqualification.] (*b*)

—but not in England.

Persons uninfluenced by religious belief.

As the statements of a person whose mind is not influenced by any religious belief cannot, of course, be raised, by a solemnity, which he considers an idle ceremony, to a higher standard than the mere assertion, without oath, of another, our Courts have strictly excluded such persons from being allowed to give evidence. No reliance can be placed on the word of a man who either is, or professes to be, devoid of all faith in a God, the avenger of falsehood. (*c*)

Old rule, as to witnesses.

[238]

New rule, as to Quakers, Moravians, &c.

The rule was formerly unbending, that no person should be admitted as a witness who could not be fairly sworn upon the Evangelists. (*d*) The firmness however of the Quakers, after some years of persecution, relieved them and the Moravians, from this obligation; first in civil cases, and by a late statute in criminal cases also. (*e*) And the increase of intercourse between this country and other nations compelled our Courts to relax the rule when foreigners appeared as witnesses. The question was discussed at great length in the well known case of *Omichund* v. *Barker*, (*f*) where a commission, sent to India to examine witnesses, had taken evidence of

Foreigners.

(*a*) See Glassford on Evidence, p. 394.

(*b*) ["But in some cases, women were, by common law, wholly excluded to bear testimony, as to prove a man to be a villain,] *mulieres ad probationem status hominis admitti non debent*, Co. Litt. 6, *b*.

(*c*) [As to such *vide supra*, p. 327, n. (*c*). It seems that the proper mode of examining a witness, for the purpose of trying his fitness, as to religious principle, is to question him "whether he believes in God, the obligations of an oath, and a future state of rewards and punishments; and not to question him as to his particular opinions." *Per* Buller, J.; R. *v.* Taylor, Peake, 11; and it seems sufficient if he states that he believes in a God who will reward or punish him in *this* world; Omichund *v.* Barker, Wils. 84, 1 Atk. 21, Wils. 541; see Roscoe's Digest of Ev., 6th ed., by Smirke, p. 104.]

(*d*) [So long as religious considerations had place, and expediency (so called) had not uprooted all principle.]

(*e*) 9 Geo. 4, c. 32; [and by 3 & 4 Wm. 4, c. 49, the affirmation of Quakers is admitted and declared to be "of the same force and effect as an oath in the usual form in all cases where an oath is required by law." By 3 & 4 Wm. 4, c. 82, a similar provision is made in favour of Separatists. And stat. 1 & 2 Vict. c. 77, provides for those who have partly given up the views of those sects, but have still certain scruples, *et vid. sup.* p. 65, n. (*f*).]

(*f*) Wils. 84; 1 Atk. 21; Willes, 541.

a Gentoo, according to his own religious forms; and it was decided that such evidence ought to be received; if given with the religious ceremony which the witness is supposed to consider most binding on his conscience. (*a*) After an examination has been taken, it cannot be impeached, by showing, afterwards, that there was some other form of oath, which the witness would have considered more solemn and obligatory: what he has done has subjected him to all the penalties of perjury; and must be considered as an imprecation of the Divine vengeance, if he should speak falsely. (*b*) Jews, Turks, &c.

[What in the view of the law amounts to] infamy is another bar to the admission of the evidence of the person marked with it. (*c*) Disgraceful conduct on the part of the witness, disclosed in the depositions, may determine the Judge in Equity to pay no regard to his evidence; (*d*) but actual incompetency, which prevents his being even heard, is one of the consequences which arise from a regular conviction, for certain crimes, duly followed up by judgment, or from an outlawry for similar crimes, which amounts to the same thing. Infamy.

The crimes which disqualify are generally classed under the heads of treason, felony, and *crimen falsi*; the latter comprehending, (besides perjury and subornation of perjury) attainder of a false verdict, conspiracy at the suit of the king, (*e*) forgery, cheating, and others of which one essential ingredient is lying or deceit. (*f*) There are some also which scarcely fall under the above heads, as a præmunire; (*g*) excommunication, until Crimes.

[239]

(*a*) [*Vide supra*, p. 65-6, n. (*f*).]

(*b*) Lord C. J. Abbott's answer to the first question in the Queen's case, 2 Brod. & Bing. 284; Sells *v.* Hoare, 3 Brod. & Bing. 332.

(*c*) [The objection to such a person, by the law held infamous, being admitted to testify, is (as to suits begun since 22nd of Aug., 1843) removed, by the stat. 6 & 7 Vict. c. 85, cited above; but the objection still remains as to the credit due to their testimony, and necessarily must be of great force, in particular cases, if urged, *vide supra*, p. 326, n. (*a*).]

(*d*) See Watkyns *v.* Watkyns, 2 Atk. 97. [And, as to credit, *supra*, p. 204.]

(*e*) But a conviction for conspiring to raise the funds, by false rumours, has been adjudged not to disqualify; Crowther *v.* Hopwood, 3 Stark. Rep. 21; see the case of the Ville de Varsovie, 2 Dods. 174.

(*f*) See Co. Litt. 6; R. *v.* Crossley, 2 Salk. 688, 690; 2 Hawk. P. C. c. 43, s. 25. [The evidence of persons who swear that in a former instance they perjured themselves is not to be received; *ex parte* Lord, 2 Ves. 26. The evidence of one who obtained his knowledge by hiding behind, &c. received; but with caution; Savage *v.* Brocksopp, 18 Ves. 336.]

(*g*) Co. Litt. 6. *b.*

the passing of the stat. 53 G. 3, c. 127; (*a*) or winning at certain games, under the stat. 9 Anne, c. 14, s. 5; but convictions under this latter statute are extremely rare.

Duration of incompetency.

The duration of the incompetency, and the circumstances under which it ceased, were formerly much mooted; but the questions have been greatly simplified by late statutes. (*b*)

Restoration of competency.

A pardon under the great seal or by act of Parliament has been long settled to restore competency. (*c*)

Statutes; 7 & 8 G. 4, c. 28,

The stat. 7 & 8 G. 4, c. 28, s. 12, enacts, "That where the "King's Majesty shall be pleased to extend His Royal Mercy "to any Offender, convicted of any felony, punishable with "death or otherwise; and by Warrant under his Royal Sign "Manual, countersigned by one of his principal Secretaries of "State, shall grant to such Offender either a free or a condi- "tional pardon, the Discharge of such Offender out of Custody, "in the case of a free pardon, and the Performance of the Con- "dition, in the Case of a conditional Pardon, shall have the "effect of a Pardon under the Great Seal, for such Offender, as "to the Felony for which such Pardon shall be so granted." (*d*)

and 9 G. 4, c. 32.

And the stat. 9 G. 4, c. 32, enacts, "That where any offender "hath been, or shall be, convicted of any felony, not punish- "able with death; and hath endured, or shall endure, the "punishment, to which such offender hath been, or shall be "adjudged, for the same; the punishment so endured hath, and "shall have, the like effects and consequences as a pardon "under the great seal, as to the felony whereof the offender "was so convicted.

(*a*) [As to excommunication in the meaning of the Law of the Church of England, see Kemp *v.* Wickes, 3 Phill. Rep. 271-2; Pytt *v.* Fendall, 1 Lee's Rep. 384; Grant *v.* Grant, 1 Lee's Rep. 593-4. As to witnesses being absolved, Scrimshire *v.* S., 2 Hagg. C. Rep. 399. The statute 53 Geo. 3, c. 127, cited above, has taken away the ancient punishment of excommunication; the person excommunicated incurs no civil penalties, except such imprisonment as the Court, in the exercise of its discretion, may think proper to direct—not exceeding six months; Hoile *v.* Scales, 2 Hagg. Rep. 566, 595-6.]

(*b*) [By stat. 31 Geo. 3, c. 35, no person was to become incompetent by conviction of petty larceny. But by stat. 7 & 8 Geo. 4, c. 29, s. 2, this distinction was done away with. See the disqualifying effect, of certain crimes, as to competency for a witness, considered by the Admiralty Court, in the case of Ville de Varsovie, 2 Dods. 185 to 191.]

(*c*) 2 Hawk. P. C. c. 37, s. 48.

(*d*) [And see stat. 4 Vict. c. 22, as to lords of Parliament and peers of the realm.]

"And whereas there are certain misdemeanors which render "the parties convicted thereof incompetent witnesses, and it is "expedient to restore the competency of such parties, after they "have undergone their punishment; be it therefore enacted, "That where any offender hath been, or shall be, convicted of "any such misdemeanor, (except perjury or subornation of "perjury,) and hath endured, or shall endure, the punishment "to which such offender hath been, or shall be, adjudged, for "the same; such offender shall not, after the punishment so "endured, be deemed to be, by reason of such misdemeanor, "an incompetent witness, in any Court or proceeding, civil or "criminal." [240]

Since these statutes.

In future, therefore, (*a*) every person who is not actually suffering punishment, or awaiting either the King's pleasure or the execution of his sentence, will be a competent witness; except in the case of conviction for perjury or subornation of perjury, and in the rare instances of escape from prison or from transportation. Outlawry, which indeed is in the nature of a punishment, is also an exception, if it be for treason or felony. (*b*) And it may be observed that a foreign witness may sometimes be suffering under a punishment, such as banishment, which would incapacitate him during life from giving evidence which an English Court could receive; provided that his crime was of a disqualifying nature, and his sentence inflicted by a competent tribunal.

Reversal of judgment.

A reversal of the judgment or of the outlawry has equal efficacy with a pardon; and as the reversal refers back to the date of the proceeding reversed, it would doubtless render admissible in a Court of Equity an affidavit or deposition made at the time when the witness was actually suffering punishment or outlawry.

Proof of the incompetency.

Strict proof of all these facts is required in the Courts of law. Even the admission of the witness himself that he has been tried and convicted, is not sufficient; the record must be

(*a*) [Even as to suits not within the act, being commenced prior to the 22nd of August, 1843. St. 6 & 7 Vict. c. 85.]

(*b*) 2 Hawk. P. C. c. 48, s. 22.

[241]

—and of its removal.

produced. (*a*) Outlawry should be proved by the sheriff's return of the *exigent*. (*b*) And the witness clearing himself must produce his pardon under the great seal, or sign manual, or the act of Parliament, or the record of the reversal, or the certificate of his having suffered punishment. Probably the strictness of this rule would not, under any ordinary circumstances, be relaxed [even] by a Court of Equity. (*c*)

II. Incompetency in the particular suit.

Interested persons.

II. We arrive now at that branch of incompetency which extends only to the particular suit or issue before the Court. (*d*) This includes every class of persons disqualified by interest, whether directly, as parties, or indirectly as being pecuniarily interested in some future use which may be made of the decree. (*e*) Many writers who have discussed the policy of our

(*a*) R. *v.* Castel Careinion, 8 East, 78.

(*b*) 2 Hawk. P. C. c. 48, s. 22.

(*c*) [Now that, since the stat. 6 & 7 Vict. c. 85, as to suits commenced since the passing of that act, the objection of infamy can only be urged in diminution of the credit, and not as an obstacle to the reception of the testimony, of one who may have been guilty of any crime whatsoever; (*vide supra*, p. 326;) it remains to be seen, and perhaps it is only to be ascertained by experience, how far this freedom of testimony is consistent with the safety of men who may be obnoxious to the result of the reception of such testimony, or of men whose enemies or adversaries will not hesitate to make use of such: this (in theory) seems a bold experiment; especially in Courts of Equity, where the witness is but privately examined.]

(*d*) [See Gilb. on Ev. 106; and *per* L. C. J. Tindal in Doe d. Teynham, Lord, *v.* Tyler, 6 Bing. 390, *et vide infra*; see also Marsden *v.* Stanfield, 7 Barn. & C. 815, ibid. 818. It was formerly an exception against a person being admitted to testify that he was "a party interested;" Co. Litt. 6 *b*, but the mere fact of his being (saving between man and wife) "of the nearest alliance, or even kindred, of counsel, or tenant or servant, to either party, though proved, was no hindrance; ibid. Nevertheless these last-mentioned circumstances might weigh as to his credit; ibid. A debtor to either party is not the less admissible; Moore *v.* M'Kay, 2 Moll. 135; but not even the custody of a document offered in evidence could be proved by one who was interested; Carrington *v.* Jones, 2 Sim. & St. 135. The Legislature having by the statute 6 & 7 Vict. c. 85 (cited fully above, p. 326-7), removed the disability of *interest*, in most cases, seems to have thrown upon the triers of the facts,—(whether juries, Judges, Masters, or other officers of the Courts, to whom inquiry, as to matters of fact, are delegated,) much more responsibility than was heretofore laid on them; for they now have the delicate task of deciding as to what degree of credit they are to give to such persons, admitted as witnesses; although such may be, practically and in fact, as well as theoretically interested. A person whose testimony, but for this statute, would have been inadmissible, seems now to be placed on a like footing with a parent or child, friend or servant; whose evidence the common law heretofore left the jury to weigh and estimate at what they might think it fairly worth; Co. Litt. 6 *b*. It seems therefore objections heretofore urged against the admissibility, will still have their proper natural force, if urged against the credibility of the testimony, of such persons; *vide supra*, p. 326, *et* p. 327, n. (*e*).]

(*e*) [It was by some thought, that stat. 3 & 4 Wm. 4, c. 42, ss. 26 and 27, applied to Courts of Equity; and "in the absence of any decision on the sub-

rules of evidence, have strongly objected to the exclusion of interested witnesses; because, in the common business of life, a prudent man would listen to what such persons say, but would weigh it very carefully before he acted upon it. And in truth it does appear a very abundant caution that will not trust the discretion of an *Equity Judge*, however rightly mere prudence might forbid its being submitted to the inexperience of a jury. (*a*) But the practical consequences of a different rule ought to be maturely weighed; and those who have not chanced to be able from their own personal observation to form an opinion upon the probable working of the opposite system, will do well to read an anecdote, related by Lord Brougham, in his speech on the state of the Law.

[242]

Parties to the suit;—when interested.

The persons who have a *direct* interest, are the actual parties to the suit; and they are strictly precluded from giving any evidence which may be beneficial to themselves. (*b*) We have seen above that in favour of his opponent, a defendant is compelled to furnish all the testimony, respecting his own interest, in the matter in dispute, that can be extorted, by the ingenuity of pleading. (*c*)

ject," a reviewer of the first edition of this Work, (in the Law Mag. Aug., 1837, p. 149,) assumed Mr. Gresley to have been guilty of an omission, in not noticing this Act. The case of Wheat v. Graham, 7 Sim. 62, might have been noticed by the reviewer; but a later case, Oliver v. Latham, Phil. R. 408, has shown Mr. Gresley's view to have been perfectly correct.

The Act applies only to Courts of Law.]

(*a*) [By the willingness with which the Court avails itself of the assistance of a Court of Law, and a jury, to try facts, where the testimony is likely to be of a conflicting nature, it would seem as if the *Equity Judge* did not desire so *delicate* an office as deciding such issues. And, indeed, in a constitutional point of view, a jury is the only *test* of credibility; *vide supra*, p. 5, n. (*b*).]

(*b*) It may be as well here to observe that the statute 6 & 7 Vict. c. 85, s. 1, expressly provides, "that in Courts of Equity, any defendant to any cause, pending on any such Court, may (still) be examined, as a witness, on behalf of the plaintiff, or of any co-defendant, in any such cause, saving just exceptions; and that any interest which such defendant, so to be examined, may have in the matter, or any of the matters, in question in the cause, shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting, or tending to affect, the credit of such defendant, as a witness." Of examination of parties, *vide infra*. As is lucidly expressed by Mr. Daniell, (in his Ch. Pr., vol. 2, p. 448) the incompetency of a party to the Record, in Equity, as at law, was grounded, solely upon his being interested. When the person objected to was not interested, his being a party mattered not, even at law; see Worrall v. Jones, 7 Bing. 398, 399; and see Phillipps and Amos on Ev., 9th edition, vol. I., pp. 45, 46, 47, 48.]

(*c*) [On this subject the reader must again be referred to Hare on Discovery, and Wigram on Points of the Law of Discovery, for full information.]

—when not interested,

But as a suit in equity often contains many issues, and the general rule compels all who are interested, in any way, to be made parties, either plaintiffs or defendants, it often happens that a person who could furnish material evidence, respecting one point in dispute, is precluded from doing so by being made a party in consequence of some interest in another point. (*a*)

—or formal parties;

Others who might be witnesses are often made parties for form's sake, as a mere trustee.

[243]

leave given, on motion of course, to examine such;

Leave is therefore frequently given in equity for [one who is] a party to [the suit to] be examined, (*b*) on motion of course, (*c*) suggesting that he is "*not interested*," and "*saving all just exceptions*." (*d*) The interest spoken of in the motion is interest in the matter to be examined to, not interest generally in the cause. (*e*) A party subjected unfairly to examination, on matters in which he is interested, might demur to the interrogatories. (*f*) On the other hand a defendant intended to be examined may disclaim, and then the objection is removed. (*g*)

(*a*) As was the case in Nightingale v. Dodd, Ambl. 583.

(*b*) [As to defendants see some early cases; Gwynn v. Petty, Toth. 71; Lea v. Band, ibid. 85; Bellamy v. Radcliff, ibid.; Suffolk v. Greenvill, 2 Ch. Rep. 89; Anon. 2 Ch. Ca. 214.]

(*c*) [Meadbury v. Isuall, 9 Mod. 438; but see 10 Mod. 19; Dixon v. Parker, 2 Ves. 219.] The party obtaining this order must serve it on the opposite party, or it cannot be read, being considered as a surprise; Mulvany v. Dillon, 1 B. & B. 413. [A party having been examined without an order, the depositions were not allowed to be read, although he had ceased to be a party to the original suit, continuing to be to the cross suit; Barden v. Gormon, 2 Moll. 376.]

(*d*) Dixon v. Parker, 2 Ves. 222; Murray v. Shadwell, 2 V. & B. 401; and the cases cited there; Lee v. Atkinson, 2 Cox, 413. Every objection holds good except the single formal one of his being a party; Rogerson v. Wittington, 1 Swant. 39; [and see the proviso in the Case Statute; Glover v. Faulkner, 1 Vern. 452.]

(*e*) Murray v. Shadwell, 2 V. & B. 406; [Ellis v. Deane, 3 Moll. 58.]

(*f*) [As to which, *vide supra*, p. 77.]

(*g*) [Plaintiff examining defendant as a witness, pays his costs; Harvey v. Tebbutt., 1 Jac. & W. 97; S. P. Weymouth v. Royer, 1 Ves. jun. 417; Eade v. Lingood, 1 Atk. 204; and see Barrett v. Gore, 3 Atk. 402. The order to examine a co-defendant as a witness may be obtained *ex parte* by a defendant, as well after as before decree; Van v. Corp, 3 M. & K. 278. And the question whether a witness is interested can only be raised where the deposition is objected to; the Court giving credit to the allegation, upon which the order is founded; Paris v. Hughes, 1 K. 1; S. P. Lee v. Atkinson, 2 Cox, 413; Hougham v. Sandys, 2 S. & S. 221; Franklyn v. Colquhoun, 16 Ves. 218; but the order was refused when an interest appeared; Anon. 18 Ves. 517. In the Exchequer, before a decree, it was a motion of course, to examine a co-defendant, as a witness, saving just exceptions; but, after a decree, an order for leave could only be made on notice; Hurd v. Partington, 1 Yo. 317. And here it may be convenient to observe, that by an Order of 1618-19, Bacon, C., "Defendant is not to be examined upon interrogatories, except it be in

Plaintiffs cannot examine each other; because they have voluntarily become parties, and if the cause miscarries, they will be liable in costs. (*a*) Defendants sometimes examine plaintiffs, with their consent. (*b*) It is the better opinion that consent is required even when the plaintiff to be examined is a trustee or a person otherwise made a party for mere form's sake. (*c*) If consent be refused, the defendant has no remedy but the filing of a cross bill. (*d*) A plaintiff so situated may move that his bill be amended and his co-plaintiff made a defendant; but whether the motion will be granted without consent is not quite clear: (*e*) the practice is to consent, for, as Lord Thurlow observed, "the end can be obtained by filing another bill." (*f*)

to examine a co-plaintiff,

or plaintiff, with consent

Defendants who are trustees, or have otherwise been made parties for mere form's sake, and against whom no decree is prayed, (*g*) are always examined [as witnesses] if neces-

[244]

to examine a defendant, or co-defendant.

very special cases, by express order of the Court, to sift out some fraud or practice pregnantly appearing to the Court; or otherwise upon offer of the plaintiff to be concluded by the answer of the defendant without any liberty to disprove such answer, or to impeach him after of perjury; Sand. Ord. 118; such a case, it would seem, was Piddock *v.* Brown, 3 P. Wms. 288.]

(*a*) Vernon *arg.* in Casey *v.* Beachfield, Prec. in Ch. 411, 1 Eq. Ca. Abr. 225; [Gilb. Eq. Rep. 98; not even when but a trustee;] Philips *v.* Bucks. D. of 1 Vern. 230; Armiter *v.* Swanton, Ambl. 393; Mayor of Colchester *v.* ——, 1 P. Wms. 595; Fereday *v.* Wightwick, 4 Russ. 115, and the cases cited there: [not even giving security for costs; Benson *v.* Chester, 1 Jac. 577. As to a *procheim ami* see Bird *v.* Owen, Mose, 312.]

(*b*) [Instances of plaintiffs' having been examined; see York *v.* Hardon, Toth. 85; Lambert *v.* Lambert, ibid. 145; Kent *v.* Benham, ibid. 146; Bristol M. of, *v.* Whitson, ibid.; and see Walker *v.* Wingfield, 15 Ves. 178; Piddock *v.* Brown, 3 P. Wms. 288, where all parties were ordered to be examined.] Even at law, where the issue is necessarily single, an instance of this has occurred; Norden *v.* Williamson, 1 Taunt. 378, and there the interest of a co-plaintiff was not allowed to interfere.

[It seems a contempt, on the part of a defendant, is proveable by the testimony of a plaintiff even; Nurse *v.* Guillem, 2 Freem. 132, 3 Rep. Ch. 39.]

(*c*) See Hewatson *v.* Tookey, Dick. 800; but see also the cases cited in the notes above.

(*d*) [The Court cannot make an order to examine a plaintiff *de bene esse*, "saving just exceptions," though they will make such order to examine a defendant; but the defendant should have demurred to such immaterial plaintiff; Mayor, &c., of Colchester *v.* —— 1 P. W. 595. The guardian of a plaintiff may be examined, *de bene esse;* Payne *v.* Rosgrave, 2 Fowl. 125; Hockley *v.* Butler ibid.; Ashley *v.* Ashley, ibid.; so on behalf of defendant Groyner *v.* Gale. ibid. On a bill by trustees, in the nature of interpleader, the Court gave leave to one of the defendants to examine one of the plaintiffs, as a witness; Armiter *v.* Swanton, Amb. 393.]

(*e*) [Motion that one plaintiff might examine his co-plaintiff, as a witness, to prove a Will, was refused, by the Court of Exchequer, in Hungah *v.* Fothergill, 2 Fowl. 125.]

(*f*) Motteux *v.* Mackreth, 1 Ves. 142, 2 Dick. 735; Lloyd *v.* Makeam, 6 Ves. 145; Witts *v.* Campbell, 12 Ves. 493; he must at the same time give security for costs. [And see Ewer *v.* Atkinson, 2 Cox, 393.]

(*g*) They are, generally speaking, incompetent if a decree is prayed against them; [Smith *v.* Chandos, Barn. 416.

But *secus* as executor, &c., in trust.

sary. (*a*) A party however who is executor in trust, or administrator in trust, has been determined not to be capable of being examined. (*b*) The question of interest [in suits prior to the statute] may always be raised, against the evidence of a party produced, under such an order; in equity most conveniently at the hearing, (*c*) at law, on the *voire dire*.

Effect of the examination of defendant;

If a defendant examined as a witness by the plaintiff do not demur, no decree can be had against him on that point; (*d*) and if he would be primarily, and another defendant secondarily, liable, the plaintiff's remedy is entirely lost. (*e*)

—and of an examination by defendant.

A defendant who has examined witnesses cannot give evidence, at least as to the point which he defends, (unless he examined them collusively): this is on the principle that if a man thinks himself interested, his testimony is as bad as if he were really so. (*f*)

See also Nightingale *v.* Dodd, 1 Barn. K. B. 257, Amb. 583, Mose, 229;] Barrett *v.* Gore, 3 Atk. 401; Eade *v.* Lingood, 1 Atk. 204; Twining *v.* Morrice, 2 B. C. C. 330, but see the case, quoted there by Mr. Mitford, of Downing *v.* Townsend.

(*a*) [Man *v.* Ward, 2 Atk. 228;] Mabank *v.* Metcalfe, 3 Atk. 95; Fotherby *v.* Pate, 3 Atk. 604; [Gibson *v.* Albert, 10 Mod. 19. A plaintiff in a suit to have the direction of the Court, being a trustee only, may be examined on behalf of the defendant; Armiter *v.* Swanton, Amb. 393: but see also Hewatson *v.* Tookey, Dick. 799.

Ground of permitting a defendant to be examined for a co-defendant is, that the plaintiff might unite distinct claims with the view of depriving the parties of each other's evidence; Murray *v.* Strodwell, 2 V. & B. 401. In Ireland an application to examine one defendant, for another, must be special; Dungannon *v.* Skinner, 1 Hog. 269. Ground of the practice of requiring for the motion for examination of a defendant by a co-defendant, a general allegation of "no interest, or none in the matters in question in the cause," is that, though he may have no direct interest in the subject of examination, he may, in the result, have an interest in that subject, the effect perhaps of his examination; Murray *v.* Shadwell, 2 V. & B. 401. After a decree for an account a defendant cannot be examined by a co-defendant, to any point on which he has examined witnesses himself, although, in fact, he has no interest in it; unless he can give some satisfactory reason to explain his conduct: and his competency may be decided on the motion for liberty to examine him as a witness; Dungannon Ld., *v.* Skinner, 1 Hog. 269.]

(*b*) Bellow *v.* Russell, 1 B. & B. 99; and as to this, *vide infra*. [But one an executor only, may be examined, even if his answer be replied to; Crookhall *v.* Smith, 2 Fowl. 101. And one who has not proved, nor acted, and takes no benefit under the will, is, in a suit to administer the estate, admissible, to support a claim of the testator; Alexander *v.* Totter, 1 Jur. 418, V. C. B.]

(*c*) Murray *v.* Shadwell, 2 V. & B. 406; Piddock *v.* Brown, 3 P. Wms. 388; [Paris *v.* Hughes, 1 K. 1.]

(*d*) Bernal *v.* Donegal Marquess of, 3 Dow. 133; [Weymouth *v.* Boyer, 1 Ves. jun. 417. But see Hutton *v.* Sandys, 1 Yo. 602.]

(*e*) Thompson *v.* Harrison, 1 Cox, 344; [Gould *v.* O'Keefe, 1 Beat. 356.]

(*f*) Dixon *v.* Parker, 2 Ves. 224, *et vide infra*, p. 345, n. (*b*). [For instances of the evidence of one defendant having been used against another, see old cases of Pitt *v.* Willis, Dick. 24, Anon. 1 P., Wms. 300; Mitchell *v.* Webb, Toth. 10; Jones *v.* Turberville, 2 Ves. jun. 11, S. C., 4 Bro. C. C. 115; Morse *v.* Royal, 12 Ves. 355; Boyer *v.* Pritchard, 11 Pr. 103.]

When a reference is made to the Master, or an issue is sent to a jury, (*a*) the order will often contain a direction, as the Court in its discretion may think necessary,—that parties,—either plaintiffs or defendants, may be examined. (*b*) In *Andrews* v. *Lady Beauchamp*, (*c*) one of the plaintiffs having died, after an issue had been granted; and her daughter, who was one of the principal witnesses, having succeeded to her claim; an application was made, that this new plaintiff's depositions should be ordered to be read: it was proposed on the other side that she should be examined *vivâ voce*, and so ordered. Thus one party got the benefit of the evidence of the person principally interested, and the other party the still greater advantage, (as it eventually happened), of cross-examining her.

On a reference, or an issue; direction, that parties may be examined.

[245]

Appendant to the rule which we have just discussed is the exclusion of the husband or wife of a party; (*d*) for both are considered, in law, as one person; or, as Lord Coke expresses it, "*quia sunt duæ animæ in carne unâ.*" (*e*) This restriction applies to every sort of interest in the suit. (*f*) It is looked upon as a matter of public policy, (*g*) for the sake of preventing discord in families, and of identifying the interests of married persons: a policy which even after a divorce, protects the con-

But husband or wife of party interested cannot be examined.

Reasons for the rule.

(*a*) [As to which, *vid. inf.* p. 3, ch. 5. Under circumstances, where parties in a suit, charging fraud, are made defendants, who might otherwise have been examined as witnesses, the House of Lords will direct issues to be tried, and such parties to be examined; Rhodes *v.* de Beavoir, 6 Cl. & Fin. 532. See also, as to this matter, Lawes *v.* Reed, 2 Lew. Cr. C. 152; Smith *v.* Morgan, 2 Mo. & R. 259; Horne *v.* Mackenzie, 6 Cl. & Fin. 625. And, in criminal cases, see a *quære* in the App. to Stark. Ev., 3rd ed. vol. 1, p. 601.]

(*b*) [As in the peculiar case of Piddock *v.* Brown, 3 P. Wms. 288, where all the parties were to be examined, but the plaintiff, being weak, under express care of the Master.]

(*c*) Tried at Stafford Assizes, July, 1834.

(*d*) [Which is not removed by stat. 6 & 7 Vict. c. 85, s. 1, *vide supra*. And so where the execution of a power was expressly required to be, "by deed attested by two or more *credible* witnesses," a deed attested by the wife of the appointee held invalid; Perry *v.* Watts, 4 Sc., N. S. 366.]

(*e*) Co. Litt. 6, *b*. [Lord Coke adds an argument even still less open to objection, viz. "And it might be a cause of implacable discord and dissension between the husband and the wife, and a means of great inconvenience." It is somewhat remarkable that the resolution on this point of law occurred on the statute of bankrupts, (see marginal reference, Co. Litt. 6, *b*). And yet that provision in the Bankrupt Acts, since passed and cited below, seems to militate against this principle.]

(*f*) [The husband or wife of certain persons, still incompetent under the stat. 6 & 7 Vict. c. 85, are also thereby expressed to be still incompetent.]

(*g*) Bull. N. P. 286; Davis *v.* Dinwoody, 4 T. R. 678. It cannot be waived by the consent of the party interested, *per* Lord Hardwicke, in Barker *v.* Dixie, Rep. temp. Hard. 264. See Barron *v.* Grillard, 3 V. & B. 166.

fidence which subsisted during coverture; (*a*) but of course does not extend to persons who have not been legally married. (*b*) For these reasons a witness was precluded from proving that a woman who was bringing an action as a feme sole was his wife. (*c*)

Evidence to criminate each other, how far admissible;

In criminal matters neither of them will be compelled to give evidence which has a tendency to criminate the other, whether a party to the suit or not. But if they give it voluntary, it will be received, except in a trial for the very crime itself. (*d*)

but to affect their interests not at all.

Where either of them is pecuniarily interested, the rule is still more strict; and the Courts do not consider this as a matter of technical form, but have excluded the evidence of a husband tending to support any interest of his wife, (*e*) whether legal or equitable, and whether she was a party to the suit or

[246]

not. (*f*) In *Gregg* v. *Taylor*, (*g*) an issue was tried whether certain persons, including the wife of W. F., were second cousins of a testator: W. F. assigned his interest, gave a release

(*a*) Lord Ellenborough in Aveson *v.* Kinnaird Ld., 6 East, 192; where the subject is discussed at some length.

(*b*) Therefore the (so called) second wife may be a witness in a trial for bigamy, (after the first marriage has been proved,) though the real wife may not; and see Peake on Ev. ch. 3, s. 4. The question whether a woman, who had been held out to the world by a man as his wife, is a competent witness to prove herself only his concubine, is discussed in Campbell *v.* Twemlow, 1 Pri. 81, and is there left undecided.

(*c*) Bentley *v.* Cook, 2 T. R. 265. A first wife was admitted by Gould, J., but on a second trial was not admitted by C. J. Holt, to bastardize the issue of a second marriage; Gilb. on Ev. 137, 138; 2 Ld. Raym. 752.

(*d*) Bull. N. P. 286; R. *v.* All Saints, 1 Phill. on Ev. 74; but see R. *v.* Cliviger, 2 T. R. 263; and Barker *v.* Dixie, Rep. temp. Hard. 264.

[Further as to the law on this matter, if necessary, consult Phill. on Ev., 9th ed., c. 5, s. 3, p. 69.]

(*e*) [Vowles *v.* Young, 13 Ves. 140; Baron *v.* Grillard, 2 V. & B. 166.]

(*f*) [It is principally for the first reason given by Lord Coke, because of the unity of interest; but it may be no less for peace sake also. And the wife of a *prochein ami* even, only because he would be interested in or liable for the costs, was held incompetent, in Hind *v.* Head, 3 Atk. 547. After the husband's death, in a case prior to the late statute, where his estate was sought to be affected, the wife having been examined upon interrogatories, to show a deposit of plate with the defendants by her husband's assent; her testimony was held inadmissible, in an action, by his executors, to recover it; O'Connor *v.* Marjoribanks, 5 Sc. N. S. 394. As to a husband's testimony (prior to the late statute), see also Langley *v.* Fisher, 5 Beav. 443, which case was affirmed on appeal. Since the late statute, it has been held, the surviving husband of a married woman is a competent witness, to prove payment of interest on a note, during her lifetime, in an action by her administrator, with a view to take the case out of the Statute of Limitations; Hart *v.* Stevens, 14 Law J., N. S. 148; 9 Jur. 225. But in Langley *v.* Fisher, *ut sup.* (on appeal) Lord Lyndhurst, C. allowed the demurrer of one whose wife was living; expressly on the ground of public policy, and for the preservation of the peace of families.]

(*g*) 5 Russ. 19.

to the executors, his wife's name was struck out as a plaintiff (in order to avoid the formal objection,) and then he tendered his evidence for the other claimants: it was rejected; and, on a motion for a new trial, Sir J. Leach, M. R., said, "It is a settled rule of law proceeding upon sound policy, that husband and wife cannot be witnesses for or against each other; and the case of *Davis* v. *Dinwoody* (*a*) has decided—what indeed was clear in principle—that it makes no difference, whether the interest of the husband or wife, to be affected by the testimony, is legal or equitable. The case of *Davis* v. *Dinwoody* had this circumstance,—that the husband's testimony, in support of the wife's interest, was directly opposed to his own interest, and would have fixed him personally with the debt, which otherwise would have been satisfied with his wife's property. But the rule was still held to apply. In the present case, this Court, having taken upon itself the administration of the property, to a part of which Mary F. claims to be entitled as one of the second cousins once removed, of the testator; she has a clear equitable interest, unaffected by the assignment and release of her husband; and of which she can be deprived only by her own consent, in open Court, or by commission, after the amount is ascertained. In support of that interest the husband was not a competent witness, and his evidence must be rejected." The rule holds good where the wife is suing as executrix. (*b*)

Davis v. *Dinwoody.*

Though the interest has ceased, the rule continues. A wife was not allowed, after her husband's bankruptcy, to prove that certain effects had been his property: (*c*) and therefore it became necessary to insert a clause in the stat. 21 Jac. 1, c. 19, s. 6, that commissioners of bankruptcy should "have power and authority to examine upon oath the wives of bankrupts for the finding out and discovery of the estates, goods and chattels of

Though the interest has ceased.

[247]

(*a*) 4 T. R. 678.

(*b*) Alban v. Pritchett, 6 T. R. 680. [In an action against a party sued as executor *de son tort*, and claiming under an assignment to him by the deceased intestate; held, that the widow was not a competent witness for the defendant, having an interest in the event of the suit, which went to fix a charge on the assets; Yardley v. Arnold, 10 Mees. & W. 141, and 2 Dowl. N. S. 311; 1 Carr. & M. 434.]

(*c*) Anon. Brownlow, 47; *ex parte* James, 1 P. Wms. 611, [and *vide supra*, p. 339, n. (*e*).]

such bankrupts concealed, kept, or disposed of by such wives in their own persons, or by their own acts or means, or by any other person or persons." (*a*)

Exceptions.

But where the fiction of personal identity cannot be kept up without absurdity, (as in the case of personal violence,) the evidence will be admitted. (*b*) In an action at *nisi prius*, brought by a trustee under a separation agreement, against a husband, for arrears of his wife's allowance, Mr. Justice Dallas applied this principle to declarations of the wife that she had been living in adultery; but on a motion for a new trial, the Court abstained from giving any opinion on the point. (*c*)

And where the evidence of the husband himself might be insisted upon in a suit between strangers, then, although it may have a tendency to charge him, the wife cannot refuse to answer. (*d*) In an action for wedding clothes, resisted on the ground that they had been furnished on the credit of the bride's father, to prove this fact the mother, who had been present at the choosing of them, was called, and though her evidence seemingly charged her husband, it was allowed. (*e*)

Mr. Justice Buller, after citing this case continues, "So perhaps in some cases in an action against her husband, though she will not be admitted to be a witness, yet a confession of her's may be given in evidence to charge him;" (*f*) and he cites another case from Strange: who reports it thus; "The Chief Justice (Pratt) allowed the wife's declaration, that she agreed to pay four shilling a week for nursing a child, was good evidence, to charge the husband; this being a matter usually transacted

(*a*) [And so by the 6 Geo. 4, c. 16, s. 37, a like harsh power is conceded. But a bankrupt's wife still cannot be examined, against her husband, to prove his bankruptcy; although by statute (as above) may be, touching discovery of his effects, see *ex parte* Groom *re* Chambers, 4 Dea. & Ch. 640; S. C. 2 M. & A. 143. And now see like powers in later statutes, as to bankrupts and their wives.]

(*b*) [The notion of a fiction of personal identity seems to arise altogether from a mistaken view of the principle, excluding the testimony of a husband or wife, for or against the other party, extending as it does, even after divorce and death; *sed vide* Bent *v.* Alcot, Cary, 95, and Cotton *v.* Luttrell, 1 Atk. 451.]

(*c*) Scholey *v.* Goodman, 1 Bing. 349.

(*d*) [Conversely, under the late statute, where the evidence of a person, as a party, may still be excluded, that of the husband or wife of such person may also be; *vide supra.*]

(*e*) Williams *v.* Johnson, Str. 504.

(*f*) Bull. N. P. 287.

by the women." (*a*) The position is extremely questionable; it is probable that a Judge who would receive a declaration of this kind, would as readily have received the wife's evidence if, voluntarily given. But the later decisions on the general policy of the rule have made it more probable that the wife's admission [248] [even] would not be received in cases similar to either of the two last cited. (*b*) At all events it should not be forgotten that they both relate to matters of domestic concern; where that is not the case, the analogy never seems to have held. In *Cole* v. *Gray*, (*c*) a bill having been filed by infants for an account of an estate left to them by their father, and the decree having ordered their mother and her second husband, (both defendants) to be examined on interrogatories, the Master had charged the husband with several sums of money as interest and produce, on the evidence of the wife; the Lord Chancellor (Jeffreys) disallowed the evidence, and declared the wife could not be a witness against her husband. (*d*) Perhaps the principle to which all these cases [of admissions] ought to be referred, is that of Principal and Agent; for in many matters, of a domestic nature, the wife, without being directly constituted or recognised as such, is constructively held to be, for all legal purposes, the agent of her husband. (*e*)

Indirect interest of persons not parties.

We will next consider the *indirect* interest in the litigation, by which a person, who is not a party to the suit, may be rendered an incompetent witness. (*f*) Equity here very closely follows

(*a*) Anon. Str. 527; see Carey v. Adkins, 4 Camp. 92.

(*b*) See Lo Texier v. The Margravine of Anspach, 15 Ves. 159; and the observations there made by Lord Eldon on the earlier case of Rutter v. Baldwin, 1 Eq. Ca. Abr. 225; [and see the grounds of decision, by Lord Lyndhurst, of Langley v. Fisher, on appeal.]

(*c*) 2 Vern. 79; and see Anon. 2 Ch. Ca. 39.

(*d*) [And see Langley v. Fisher, 5 Beav. 443, and cases there cited.]

(*e*) See White v. Cayler, 6 T. R. 176, other cases, *supra*, p. 315, n. (*a*), and several cases collected in 1 Phill. on Ev. 79, [where the subject is more fully discussed and explained. As to how far letters of a husband to his wife may be evidence, in the Ecclesiastical Court, see Neeld v. Neeld, 4 Hagg. 267. Although, it seems, by the Roman civil law, parents and children were incompetent to give evidence for or against each other, in the same degree that a husband and wife were; and the objection extended to ascendants and descendants *ad infinitum*; yet, even in that law, there were many exceptions; see Ayliff. Parer. 542. No such objections exist now in the civil law Courts of England; see Rogers' Ecc. Law, tit. Evidence, 388, and see Thwaites v. Smith, 1 P. Wms. 10, and Scott *p.* Scott, 1 Cox, 367, on this subject.]

(*f*) [In a suit commenced prior to the late statute only.]

the Common Law, and relies upon its decisions; but it must be again observed that a difference arises from the liberty given in the former of combining many issues into one suit, while in the latter the subject of the litigation is reduced as much as possible to a single point. Even at law there is a tendency to admit the evidence of a witness, if the cause does not seem to be taking a turn which will lead to a verdict effecting his interest. (*a*) But in equity the constant test of the admissibility of evidence is whether or no the witness is interested in that issue, or that part of the decree, upon which his depositions bear. (*b*)

Test in such cases.

[249] It may be premised, as a thing to be borne in mind throughout the cases which follow, that an interested witness was at all times competent to give evidence to his own disadvantage. (*c*)

Cases of *Bent* v. *Baker*,

The law on the subject of incompetency from interest was ill defined before the case of *Bent* v. *Baker*, (*d*) which is often quoted as a leading authority. The rule was there laid down so distinctly and satisfactorily that, to insert the very words of the learned Judges, who decided that case, will be the most clear and convenient mode of introducing it here. The defendant was an underwriter on a policy of insurance; the witness, a subsequent underwriter on the same policy, had a similar action against himself waiting to be tried next and therefore certain to follow the event of that before the Court: thus their interests were identified, but independent. Lord Kenyon said, "I premise with mentioning what was said by Lord Mansfield on this subject, (*e*) that "The old cases upon the competency of witnesses, have gone upon very subtle grounds: but of late years the Courts have endeavoured, as far as possible, consistent with those authorities, to let the objection go to the *credit*, rather than the *competency* of a witness." And if the opinion

(*a*) See De Symonds v. Delacour, 5 Bos. & Pul. 374.

(*b*) [*Vide supra*, p. 336, n. (*s*); and see Oliver v. Latham, 1 Phill. Rep. 408; stat. 3 & 4 Wm. 4, c. 42, ss. 26 and 27, held to be wholly inapplicable to the Courts of Equity.]

(*c*) Gilb. on Ev. 139; see as bearing on this point notes at p. 309, *supra*; and see Lord Henley on Bankruptcy, 364.

(*d*) 3 T. R. 27, [since see Wormald v. Macintosh, 5 My. & C. 5, and cases cited there.]

(*e*) Walton v. Shelley, 1 T. R. 300.

of so great a Judge stood in need of any support, it would have it from the sentiments of Lord Hardwicke in the case of *R.* v. *Bray*, (*a*) who said that whenever a question of this sort arose on which a doubt might be raised, he was always inclined to restrain it to the credit, rather than to the competency of the witness, making such observations to the jury as the nature of the case should require. Now fortified with two such authorities as these, I have no scruple in declaring my concurrence that, wherever there are not any positive rules against it, it is better to receive the evidence of the witness, making nevertheless such observations on the credit of the party as his situation requires. (*b*) Then it is to be considered what is the question put to a witness on his *voire dire*. It is, is he really interested in the cause? Sometimes, indeed, the counsel enter into the detail and ask *how* he is interested. But the general question involves it in all the others, and amounts to this, whether the *record* in that cause will affect his interest?"—"I must acknowledge that there have been various opinions upon this subject, and that it is impossible to reconcile all the cases. Then we have only to consider what are the principles and good sense to be extracted from them all. I think the principle is this; if the *proceedings in the cause* cannot be used for [or against] him he is a competent witness; although he may entertain wishes upon the subject, for that only goes to his credit and not to his competency; (*c*) as where he stands in the same situation with the party for whom he is called to give evidence, there is no doubt but it may influence his testimony; or where a father

R. v. *Bray*,

[250]

(*a*) Lee's Rep. 1 Hard. 360.

(*b*) [This seems to be the view adopted by the Legislature, and embodied in the late statute 6 & 7 Vict. c. 85, so frequently adverted to.

But it remains to be proved, whether this view is much or at all the best view. Far be it from any man to say that "all men are liars,"—but if the editor might presume to express an opinion, he would suggest that, the temptation self-interest offers is almost too great for most men; and that the old common law provision, excluding altogether the testimony of most interested persons, was at least a very merciful provision for such persons, a sort of "lead me not into temptation" protection, to the weakest as well as the worst of men. Nevertheless, the inconvenient extensiveness of the old rule (arising from that freedom from arbitrary power which should take upon itself to make exceptions to the law, with a view to doing justice) may have rendered a change in the law necessary; and if not, the Legislature can, in this matter, very easily return to the "old paths."]

(*c*) [The very distinction, expressly adverted to, in stat. 6 & 7 Vict. c. 85, *vide supra*, p. 327.]

is giving evidence for his son: but this does not render him incompetent." Mr. Justice Buller, in the same cause, expressed himself thus, "When the case of *Walton* v. *Shelley* was argued here I looked into all the cases on the subject, and particularly into those on this head: the Court in that case approved of what was laid down by Lord Hardwicke in *R.* v. *Bray*, that it was better to lean against objections to the competency, and to let them go to the credit of the witness. The true line I take to be this, *is the witness to gain or lose by the event of the cause?* Now this witness could not gain or lose by the event of this cause, because the *verdict could not be evidence* either for or against him in any other suit." Lord Kenyon reviewed and deliberately confirmed the rule thus laid down by him, in the case of *Smith* v. *Prayer*, (*a*) declaring that no objection could be made to the competency of the witness upon the ground of interest unless he were directly interested in the event of the suit, or could avail himself of the verdict in the cause so as to give it in evidence on some future occasion in support of his own interest."

Smith v. *Prayer,*

The entire applicability of these passages to evidence in equity is recognised by Lord Eldon, who said, in 1818, "There is no doubt that of late years, Courts of Justice have struggled to convert objections to the competence of a witness into objections to credit; and recent decisions, (which, though it is difficult always to understand the grounds, are substantially right,) establish this, that if the witness has no *interest in the event of the cause*, though his answer to the question may be evidence for or against him in another cause, that is not an objection to his competence." (*b*) And Lord Brougham said in 1828, "The rule established in *R.* v. *Bray* has ever since been followed: and now, in all cases, a person is competent whatever bias he may have from interest, provided the verdict cannot be given for or against him in another cause." (*c*)

Vaughan v. *Worrall.*

[251]

(*a*) 7 T. R. 62.

(*b*) Vaughan v. Worrall, 2 Swanst. 399; [and now see Wormald v. Macintosh, 5 M. & C. 5.]

(*c*) Speech on the state of the Law, p. 88. [This, it may be observed, was prior to stat. 3 & 4 Wm. 4, c. 42, cited above, but which applied only to Courts of law, *vide supra*, p. 336, n. (*e*). And now the rule is to be gathered out of the stat. 6 & 7 Vict. c. 85, *vide supra*, p. 326-7.]

As this rule is so fully established, (*a*) it will not be worth while to examine the old cases on the subject. The following modern decisions will serve as examples to show the line which defines it. In an action of trover by A. against B., C. was held a competent witness to prove the property to be his own; Lord C. J. Abbott observing, "The proving of the title in himself in this case does him no good, and consequently he stands indifferent as to the legal result." (*b*) In an action on the case by a reversioner for injury to the inheritance, his tenant in possession was allowed to prove an encroachment. (*c*) In an action on a covenant against a lessee for not using a stipulated quantity of manure, a sub-lessee was competent to prove how much had been used. (*d*) A plaintiff in equity may, even while the suit is pending, give evidence against a defendant, in a prosecution for perjury, alleged to be contained in his answer. (*e*) And in an action for usury, the borrower of the money is a competent witness to prove the whole case. (*f*)

Old cases.

[252]

The interest must be personal: the [Roman] Civil law refused the testimony of relatives, and had many rules of exclusion, which have not been followed by our Courts of Equity. (*g*) Yet there is a case which, if rightly decided and reported, shows that we ought not entirely to overlook these disabilities. A will of personalty, (which, as it would seem, could not have been either written or signed by the testator,) was attested by three witnesses; two of them were sons of the residuary legatee, and were not admitted as witnesses for their

Interest must be personal.

(*a*) See, however, some observations of Sir Ja. Scarlet, the late Ld. Abinger, C. B., *infra*.

(*b*) Ward *v.* Wilkinson, 4 B. & A. 410; and see Nix *v.* Cutting, 4 Taunt. 18.

(*c*) Doddington *v.* Hudson, 1 Bing. 257.

(*d*) Wishaw *v.* Barnes, 1 Camp. 341.

(*e*) R. *v.* Boston, 4 T. R. 572. Conflicting cases are cited there; it was decided on the ground that no use could be made of the conviction for any purpose of the prosecutor in his suit in equity; Lord Henley having, in Bartlet *v.* Pickersgill, refused leave to the plaintiff to file a supplemental bill in the nature of a bill of review, stating the conviction.

(*f*) Smith q. t. *v.* Prayer, 7 T. R. 60.

(*g*) See a note in Phill. on Ev. 17. [Or even by our so called civil law Courts, *vide supra*, p. 345, n. (*e*). Although the law (which could only draw its line between interest and no interest) permitted certain witnesses to be heard, against when no strictly legal exception could be made, on account of direct pecuniary interest, in the event of the suit, yet it required them to be heard (as indeed common sense does) with a very considerable deduction from the *credit* to which they might be entitled. *Per* Sir John Nicholl in Saph *v.* Atkinson, 1 Add. R. 184; and see Evans *v.* Knight, 1 Add. R. 235.]

father; the evidence of the third, being single and unsupported, was insufficient, and the will could not be proved. (*a*)

Interest must be present.

The interest must be more than a mere expectancy or probability: an heir apparent may be a witness concerning the title of land, or charges upon it, for his heirship is only a contingency; but one who has a vested remainder cannot, for he has a present estate in the land. (*b*) So a co-obligor in a bond for due administration, is a good witness to prove a tender by the administratrix; though a bail is incompetent, because he would immediately become answerable if a verdict were given against his principal. (*c*) Where two requisites must be combined to give a claim to certain rights, a person who possesses one only of those requisites, may give evidence in support of those rights. (*d*)

Mistakes about interest.

The ignorance of the witness with regard to his interest, does not make his evidence admissible; a rule of which the prudence is obvious. But a more difficult question arises when a person not really interested believes himself to be so. On one side it is urged very forcibly that "It would be productive of great inconvenience to substitute a witness's mistaken notion of his legal liability for the more plain and simple test of actual
[253] liability; that, "it might be impossible to render him competent even by means of a release, for he might still be sceptical as to the operation of a release;" and that "the party who calls him has an interest in his testimony which ought not to be defeated by any thing short of a legal interest in the event." (*e*) But this ingenious reasoning has never shaken the plain sense on which the question rests, and when the point has been discussed and the witness appeared *bonâ fide* to have considered himself legally interested, the decisions have been uniformly against admitting his testimony. (*f*) Where however the

(*a*) Thwaites *v.* Smith, *cor. del.* 1 P. Wms. 10. [And see Further *v.* Sanger, 1 M'Clel. 435; S. C. 13 Pri. 119. But the stat. 6 & 7 Vict. c. 85, has an express proviso "that the act shall not repeal any provision in the Act for the Amendment of the Law with respect to Wills," stat. 7 Wm. 4, and 1 Vict. c. 26, which is therefore still the sole guide as to competency of attesting witnesses to wills since 1837.]

(*b*) Aldridge *v.* Wallscourt Lord, 1 B. & B. 318; Smith *v.* Blackham, 1 Salk. 283; Ld. Raym. 724.

(*c*) Carter *v.* Pearce, 1 T. R. 163.

(*d*) Stevenson *v.* Nevinson, Str. 583.

(*e*) 1 Stark. on Ev. 103.

(*f*) Fotheringham *v.* Greenwood,

witness merely considered himself under an obligation in honour to pay a sum of money according to the event, or to contribute to the expenses of the suit, the evidence has generally been received; indeed that very feeling of honour may be looked upon as a guarantee that he will speak the truth. (*a*) The question is ably discussed, and the cases are referred to, by Mr. Phillipps. (*b*) The point was raised in *Parker* v. *Whitby*, (*c*) where the witness whose depositions were about to be read, had admitted upon cross-examination that he conceived himself bound in honour, though not legally bound, to contribute to the expenses incurred by a cross-suit; Sir T. Plumer was of opinion that according to the latest authorities, the evidence was admissible.

Obligation in honour.

Taking then, (*d*) as our basis, that a witness produced in an equity suit, or at the trial of an issue, (*e*) has a disqualifying interest in the event, whenever the decree or verdict may be such as can be used for him in some other legal proceeding which he will be in a situation immediately to undertake, or against him in some legal proceeding to which he will be then immediately liable; we will endeavour to classify the persons who stand in this predicament. (*f*)

Rule stated.

[254]

First, The class whose interest most nearly approaches that of the parties, consists of those who, in some suits, for convenience, are not named on the record, though they are in fact the real litigants, and are liable for the costs;—persons, in short,

Persons virtually parties.

Stra. 129; Lord Loughborough, C. J., in Treelawney *v.* Thomas, 1 H. Bl. 307; the case of the Amitié Villeneuve, 5 Rob. Ad. Rep. 344; [6 Cl. Rob. 269, note.] And see, as to expectation generally, Rudd's case, Leach's Cro. Ca. 151; where it was decided that the evidence of a woman who hoped by convicting the prisoner to save her husband's life, might be received. C. J. Holt seems to have once rejected a woman's evidence on a singular ground, "because she swore for her advantage, viz. to have a husband;" Broughton *v.* Harpur, Ld. Raym. 752.

(*a*) In Chapman's case, cited 1 Stra. 129, Lord Parker is said to have rejected it "on solemn debate;" but in Poderson *v.* Stoffles, 1 Camp. 144, Sir J. Mansfield, C. J., received it; and see the note there. [The use of this (so called) "feeling of honour," amongst sporting men, on a trial at law, see Greville *v.* Chapman, 5 Q. B. 731; 1 Dav. & M. 553.]

(*b*) 1 Phill. on Ev. 50.

(*c*) 1 T. & R. 372.

(*d*) [In the consideration of "any suit, action or proceeding," originally "brought or commenced," before the passing of the late stat. 6 & 7 Vict. c. 85, s. 2, which passed 22nd August, 1843.]

(*e*) [Not within the statute.]

(*f*) [Still bearing in mind that statute 3 & 4 Wm. 4, c. 42, ss. 26 and 27, was not intended to apply to Courts of Equity, *vide supra*, p. 336, n. (*e*).]

who are virtually, but not nominally, parties to the suit. Such are the members of a company who have been empowered by an act of Parliament to sue and be sued in the name of their treasurer. (*a*) Their interest in the decree is obvious;—by means of it,—if favourable, they can prove the amount to which the nominal party, (who has acted as their agent,) is accountable to them,—if adverse, they may be themselves compelled to contribute to the expenses of the suit. In *Vaughan* v. *Worrall*, (*b*) it was taken as indisputable law, that the examination of witnesses, who had subscribed with the plaintiffs for the expenses of the suit, ought to be suppressed; though Lord Eldon intimated that he had never seen the doctrine of incompetency extended exactly to that point before. In an action against several defendants, if one plead his bankruptcy and the others the general issue, the former cannot be admitted to give evidence for the rest, (though he may have received his certificate,) for in the event of a verdict for the plaintiff, he is liable for the costs of the action. (*c*)

Vaughan v. *Worrall.*

Some other instances will be given when we speak of the restoration of incompetency; it will be seen there that this is an objection peculiarly difficult to be remedied.

Parties not on the record are very common at law, for trustees sue there in their own names alone, legal rights only being adjudicated upon; in equity they are the less frequent, because of the general rule that all persons interested shall appear before the Court.

[255]

Secondly; Besides the parties, nominal and real, there are often other persons who are interested in the fund or property which is the subject of litigation, but who have no control over the suit, and are not liable for the costs: such are legatees when executors are suing or being sued for assets. (*d*) By persons

Persons interested in the property disputed.

(*a*) Whitmore v. Wills, 1 M. & M. 214, 3 C. & P. 364.

(*b*) 2 Swanst. 396, *et supra*, p. 348.

(*c*) M'Iver v. Humble, 16 East, 171; and see Gow on Partnership, 199, 216. [This liability for costs renders even the wife of a *prochein ami* incompetent, *ut supra*, in a suit prior to statute 6 & 7 Vict. c. 85. As to a bankrupt see Udal v. Walton, 4 Law J., N. S. 262, 9 Jur. 515.]

(*d*) [Bond creditors of the estate of a testator held to be incompetent witnesses, to obtain a decree for the payment of legacies, as their debts are prior claims; Jones v. Turberville, 2 Ves. jun. 11; S. C. 4 Bro. C. C. 115. As to the other creditors and legatees in

so situated a favourable decree might undoubtedly be used with advantage in any future proceedings for the inforcement of their rights; but the simpler and more usual way of testing their competency is to ascertain whether they could receive any pecuniary advantage or injury from the gain or loss, increases or diminution, of the right or property in litigation.

Thus a remainderman is incompetent to prove payment of a legacy charged on the estate. (*a*)

A co-partner cannot give evidence for a defendant who is sued alone for a partnership debt; Lord C. J. Best said, "If the plaintiff had obtained a verdict, would not that verdict have affected the witness F.? It is true the record would not have been evidence to establish any claim against F., but only to show the amount that had been recovered. But it is clear that either at law or in equity, the defendant would have been entitled to contribution from F., in respect of the plaintiff's demand." (*b*)

A creditor of a bankrupt cannot give evidence to increase the estate, or to prove the bankruptcy or trading. (*c*) Neither can the bankrupt himself, because he will be entitled to an allowance if he pays a certain per centage, and to the surplus [256]

Bankrupts, &c.

general of the deceased being competent witnesses in suits by or against the executors to increase or protect the estate, but residuary legatees not; see Nowen *v.* Davis, 5 B. & Adol. 368, and cases there cited.]

(*a*) Aldridge *v.* Lord Wallscourt, 1 B. & B. 312. [Two persons, each claiming a rent-charge out of the same land by the same deed, held to be not competent as witnesses for each others' title, until each had released his own rent-charge; Culpepper *v.* Fairfax, 2 Vern. 375.]

(*b*) Evans *v.* Yeatherd, 2 Bing. 135; and see Blackett *v.* Weir, 5 B. & C. 386. [A partnership cannot be proved by the evidence of the partners and their private communications. The fact must be proved *aliunde*; for want of such proof a commission against the ostensible partners was sustained; *ex parte* Benfield, 5 Ves. 424.]

(*c*) *Ex parte* Osborne, 1 Rose, 387, 2 V. & B. 177, and see the note there; and see *ex parte* Chamberlain, 19 Ves. 481. [But note the objection of being incompetent cannot be taken by himself to escape examination: *Re* Godie, 2 Rose, 330.] Lord Ellenborough once admitted a creditor who had not proved, to support the commission, (not to increase the fund,) Williams *v.* Nunn, 2 Camp. 301, but Lord Eldon said "it is not enough that a creditor has not availed himself of the commission; to make him a competent witness it ought to be certain that he never will;" see note 1 Rose, 292. An undertaking not to prove is now required, see note 2 V. & B. 180; and see Adams *v.* Malkin, 3 Camp. 543; Crook *v.* Edwards, 2 Stark. Rep. 302; *ex parte* Malkin, 2 Rose, 27. [But to negative the bankruptcy, a creditor a competent witness; *ex parte* Codd, 2 Sch. & L. 116; and see *ex parte* Osborne, 2 Ves. & B. 177; S. C. 1 Rose 357. A creditor, who has assigned his debt, a competent witness to increase the fund; Heath *v.* Hall, 4 Taunt. 326.]

if any should remain; (*a*) nor will his depositions be received after his death. (*b*) Before the certificate has been given, the uncertainty of obtaining it has been held of itself a sufficient disqualification; (*c*) and after the certificate has been given, that objection still holds so far good as to preclude him from proving any fact necessary for the support of the commission; for if the bankruptcy were superseded, the certificate would become inoperative. (*d*) A case has been much questioned in which Lord Kenyon held that a bankrupt was not interested in an action by his assignees against a creditor claiming a lien, who, if he lost the lien, would prove under the bankruptcy. (*e*)

Minuteness of interest not considered.

The magnitude of the interest is not a point to be considered; however small it may be, the line of exclusion is strict. It is true that in the old case of R. v. The Mayor, citizens, and commonalty of London, Lord C. J. Scroggs, is reported to have said that the question was "whether the interest was so valuable that it might be presumed to produce partiality; (*f*)

(*a*) Ewens v. Gold, Bull. N. P. 43; *ex parte* Burt, 1 Mad. 46. [Since the statute 6 & 7 Vict. c. 85, a bankrupt has been held to be a competent witness to prove a collateral fact connected with his bankruptcy; Udal v. Walton, 14 Law J. N. S. 262; S. C. 9 Jur. 515. Whether he is also admissible to support the commission; *Quære* ibid. A bankrupt having released and assigned all his estates to the assignees was examined as a witness for them; Phillips v. Wilcox, 2 Vern. 637. That the servant of a bankrupt is a good witness for the creditors, although he received his wages after the bankruptcy; Humphrey's case, 2 Eq. Ab. 396. In a suit against the assignees tending to diminish the fund the bankrupt examined; Griffin v. Archer, 2 Anstr. 478. A mortgagor having become bankrupt a competent witness to shew notice of a prior incumbrance, but not to establish the transaction as usurious; Clark v. Wilmot, 1 Yo. & C. 53. Yet where testimony of the bankrupt partly for and partly against interest, it was admitted; Smith v. Biggs, 5 Sim. 391.]

(*b*) *Ex parte* Campbell, 2 Rose, 51.

(*c*) Masters v. Drayton, 2 T. R. 496, but (as was urged there in the arguments) this is more in the nature of an influence, affecting the credit, than an interest; [see Speidell v. Fuller, Dick. 633:] see however Goodhay v. Henry, 1 M. & M. 320; Tennant v. Strachan, ibid. 378; and *vide infra*.

(*d*) Morgan v. Pryse, 2 B. & C. 14. In that case however the rule was strictly confined to the letter; and proof of the handwriting of the commissioners in order to identify the proceedings, was not taken to be evidence affirming the bankruptcy. And see Reed v. James, 1 Stark. Rep. 134. [But having had his certificate and allowance his evidence admitted; Russell v. Russell, 1 Bro. C. C. 269.]

(*e*) Jourdaine v. Lefevre, 1 Esp. 66; see Lord Henley on Bankruptcy, 362; and see Waugh v. Land, Coop. 129. [Cranford v. Att. Gen., 7 Price, 2. The following cases, relative to the testimony of bankrupts, and creditors of such, may be found useful; *ex parte* and *Re* Palmer, 1 Dea. & Ch. 375; Sayer v. Garrett, 4 Moore & P. 734; *ex parte* and *Re* Lowley, 1 Dea. & Ch. 460; S. C. Mont. & Bl. 168; *ex parte* Bellwood, 2 Dea. & Ch. 37; *ex parte* Gwyn, 2 Dea. & Ch. 12; *ex parte* Arnsby, 3 Dea. & Ch. 10; *ex parte* Freeman, 4 Dea. & Ch. 404; *ex parte* and *Re* Lavender, 4 Dea. & Ch. 487; S. C. 1 Mont. & Ayr. 702.]

(*f*) 2 Lev. 231, 2 Show. 47; and see a very similar case, 2 Vent. 351.

and that Lord Hardwicke is said to have expressed himself to a somewhat similar effect. (*a*) But Mr. J. Buller, when he quotes these cases, questions, in the margin, whether it be law; [257] and the authorities decidedly preponderate against it. In *Dowdeswell* v. *Nott*, it was said *per Cur.*, "The cases where the party was concerned in interest, though never so small, have always prevailed, and it was so resolved upon great debate in the case of the *City of London* concerning the *Water Bailiff*. (*b*) So in a question between two extensive parishes as to the repair of a road, the inhabitants of neither were allowed to give evidence: (*c*) and where a charity had been given to the poor of a parish, Lord C. Parker would not allow parishioners to prove it. (*d*) So also, where a corporation having a manor, had approved part of a common and leased it, a freeman was not competent to prove that a sufficiency was left for the commoners. (*e*) And in the late case of *Hovill* v. *Stevenson*, where the plaintiff in an action on a charter-party, had communicated to the attesting witness an interest in the adventure, Lord C. J. Best said, "According to our law, a direct interest to the smallest amount in any person, will prevent such person from being examined as a witness." (*f*) These authorities warrant the decided language of Mr. Phillipps, "that a person who loses or gains the smallest sum by the event of a suit, whatever may be his rank, fortune, or character, is as incompetent to give

(*a*) In R. v. Bray, as reported in Bull. N. P. 290; but see the case as reported in Lee's Rep. t. Hard. 358; and see the argument in Doe v. Tooth, 3 Yo. & J. 20; and see Vin. Abr. tit. Evid. G.; Cook v. Fountain, 3 Swanst. 585. The interest of an auctioneer, from his commission, does not defeat his evidence; Buckmaster v. Harrop, 13 Ves. 474.

(*b*) 2 Vern. 317; [and see Sutton Coldfield, Corp. of, v. Wilson, 1 Ves. 254; and the same principle is admitted in Wormald v. Mackintosh, 5 Myl. & C. 5.]

(*c*) R. v. Buckeridge, 4 Mod. 48; and see R. v. Inhabitants of Hornsey, 10 Mod. 150; 15 East, 474. Their competency is restored for proof of boundaries and certain other purposes by the stat. 54 Geo. 3, c. 170, s. 9, and the stat. 5 & 6 Wm. 4, c. 50, s. 100.

(*d*) Att. Gen. v. Wyburgh, 1 P. Wms. 600; [and see, as to parishioners, in tithe causes; Jackson v. Benson, 2 Yo. & J. 45; Watson v. Lindsel, Bunb. 40.]

(*e*) Burton v. Hinde, 5 T. R. 174.

(*f*) 5 Bing. 497; he adds, "If the party declines releasing his interest, whatever may be its amount, it seems that he feels it of importance to him, and therefore cannot be trusted as a witness in a suit instituted for the recovery of it." See Mr. Starkie's remarks upon this, 1 Stark. on Ev. 117, note.

evidence as one who may be interested to the amount of thousands." (*a*)

Members of corporations,

It will have been observed that several of the cases just cited are cases of corporations, and there is certainly another ground upon which the exclusion of such witnesses might rest, namely, that they are virtually parties to the suit and therefore liable for the costs. (*b*) This objection must always hold good except when they are mere trustees: that was the case in *Weller* v. *The Governors of the Foundling Hospital*, and Lord Kenyon admitted several of the governors to prove the badness and insufficiency of the work for which the action had been brought. (*c*) Lord Keeper North felt so strongly the inconvenience of the exclusion of corporators, that he said, "A corporation ought to have a town-clerk and under-clerks that are not freemen, that they may be competent witnesses on occasion;" adding, that "he thought it very hard in the case of the water-bailage of London, that no one freeman of the city, though it was not sixpence concern to him, could be admitted as a witness." (*d*)

[258]

mere trustees.

But when they are mere trustees, then persons who have a legal interest, and in equity (as we have mentioned above) (*e*) even the parties to the record, after the usual order has been obtained, are competent witnesses. (*f*) The case just cited of

(*a*) 1 Phil. on Ev. 61. [And this still holds as to suits, &c., commenced prior to the late Act.]

(*b*) Doe *v.* Tooth, 3 Y & J. 19; see Mr. B. Hullock's judgment.

(*c*) Peake's Ca. 153. This case has sometimes been cited to show a distinction between the corporate and private capacity of a witness, but it has not that effect; see Doe *v.* Tooth, 3 Y. & J. 19.

(*d*) Corporation of Sutton Coldfield *v.* Wilson, 1 Vern. 254. The Lord Keeper stated also in the same case, that "where a man was a legatee, if it was an inconsiderable legacy, as 5*s.* (or 5*l.* to a man of quality), he should nevertheless be a witness to prove the will." [But this remark must not mislead the reader to forget that the late Wills Act, 7 Wm. 4, and 1 Vict. c. 26, is the standard as to competency of a witness to a will. If a corporation will make use of one of their own members as a witness they must disfranchise him; Mayor, &c. of Colchester *v.* ——, 1 P. Wms. 595. In general mere witnesses are not to be made parties to a suit in equity; but, (amongst others) officers and servants of corporations are exceptions to this rule, see Dummer *v.* Corp. of Chippenham, 14 Ves. 252; else no discovery could be obtained.]

(*e*) [Man *v.* Ward, 2 Atk. 228, *et*] *vide supra*, p. 338.

(*f*) Bull. N. P. 284; Fotherby *v.* Pate, 3 Atk. 604; Craven *v.* Tickel, 1 Ves. 61. [And the stat. 6 & 7 Vict. c. 85, leaves untouched the power of the Courts of Equity as to examination of defendants; only removing the sole objection of interest, *vide supra*.]

the Governors of the Foundling Hospital is an instance; and some other instances which have been mentioned as authorities respecting the admission of parties as witnesses may be referred to. (*a*) Where an estate was to go to such child as the father, with the consent of a trustee, should appoint, and, in default, to the eldest; and it was appointed to the youngest: on a bill to set aside the appointment, on the ground that the father had deceived the trustee, the trustee's evidence was read, to prove imposition on him and misrepresentation; while the father's evidence, to disprove it, was rejected. (*b*) A *prochein ami* is considered to be interested, because he is liable for the costs, (*c*) and for the same reason a trustee who is plaintiff is incompetent. (*d*) At law an executor in trust or an administrator can be examined, but it has been held in equity that he is incompetent: Lord Hardwicke said in one case, "A trustee, though he has the legal estate, is considered as having no interest at all in this Court, and is examined by orders every day; but a person, executor in trust, or administrator in trust, has been determined not to be capable of being examined; possibly the reasons of the difference are pretty nice, and it is very difficult to find out any real or solid foundation for it; but I take the ground to be, he is considered as representing the testator's estate, and is answerable for *devastavits*, &c., and that may give an improper bias to his mind: for as the law considers him as owner of the estate, the possibility of maladministration has induced this Court to reject him as a witness." (*e*) He con-

Prochein ami.

[259]

Executors and administrators.

(*a*) *Vide supra*, p. 338.

(*b*) Scraggs *v.* Scraggs, Ambl. 272.

(*c*) Head *v.* Head, 3 Atk. 547. [And therefore the wife of a *prochein ami* (prior to the late statute) was held to be incompetent as a witness; *vide supra*. But now a *prochein ami*, though liable to the defendant for costs, (not being a party to the suit, but simply a person appointed by the Court to look after the interests of the infant, and manage the suit for him,) has been held to be not within the exceptions to the stat. 6 & 7 Vict. c. 85, s. 1: *vide supra*, p. 327. It has been held therefore that the *prochein ami* and his wife are admissible witnesses; Sinclair *v.* Sinclair, 13 Mee. & W. 640; 14 Law J., N. S. 109.]

(*d*) —— *v.* Fitzgerald, 9 Mod. 380.

(*e*) Fotherby *v.* Pate, 3 Atk. 603; and see Croft *v.* Pyke, 3 P. Wms. 130; Mabank *v.* Metcalf, 3 Atk. 95; Floyd *v.* Powis, quoted by Lord Manners, 1 B. & B. 413; Bellew *v.* Russell, 1 B. & B. 96; Mulvany *v.* Dillon, 1 B. & B. 413; [and as to when an executor is a competent witness, see Jervoise *v.* Duke, 1 Vern. 230; Cook *v.* Fountain, 3 Swanst. 585. In general he is not to increase the assets; Hurst *v.* Beach, 5 Madd. 353. The evidence of an executor who has not proved, nor acted, and who takes no beneficial interest under the testator's will, is, in

Administrator *durante minori ætate,*

tinues, "But the case of an administrator *durante minori ætate* is certainly different; it is true he represents the testator whilst his administration subsists, but when it is determined, he has nothing more to do; such administrator cannot sue, that is certain, nor can he be called to an account, but by the executor and whatever he may do during his administration, he is not answerable to any other person, and if an action at law should be brought against the executor, he might be introduced as a witness for the executor.—This administrator is little more than a person appointed *ad colligendum bona*, or an administrator *pendente lite*, and these are always admitted as witnesses;" and he allowed the evidence of the person so situated.

or *pendente lite.*

Assignee of a bankrupt.

An assignee of a bankrupt if he releases his individual claim as a creditor and is not a party to the suit, is a mere trustee, and therefore a competent witness. (*a*)

[260]

Persons having other interests, which may be affected by the decree, verdict, or judgment.

Thirdly; There are persons who though not interested in the fund or property, the subject of the litigation, have other interests of their own, which may be materially affected, by the decree or verdict to be pronounced. If one who has a suit exactly similar, has agreed to let his own case abide the event of that before the Court, he is obviously interested in the strongest manner to prevent an adverse judgment; so, as Lord Ellenborough said in the King's Bench, "if a person who is under no obligation to become a witness for either of the parties to a suit, choose to pay his debt beforehand, upon a condition that it is to be determined by the event of that suit, he becomes as much interested in the event as if he were a party to the consolidation rule." (*b*) So if he choose to bind himself to indemnify one of the parties against the costs. (*c*)

It is the same thing if, without having voluntarily connected his interest with the suit, he is so situated that he may incur some liability from the decree, or may derive assistance from it, in the obtaining some right or advantage. (*d*) A tenant in

an administration suit, admissible to support his testator's claim; Alexander *v.* Totter, 1 Jur. 418, V. C. B.]

(*a*) Tomlinson *v.* Wilkes, 2 Brod. & Bing. 398.

(*b*) Forrester *v.* Pigou, 1 M. & S. 14.

(*c*) Hendebowrnk *v.* Langley, 3 C. & P. 571.

(*d*) This rule causes inconvenience

possession is not a good witness to support his landlord's title; because it is to uphold his own possession, and he is liable for the mesne profits. (*a*) A co-partner of the defendant, who has suffered judgment by default, cannot be called as a witness by the plaintiff, to prove a debt; because the verdict may obtain for him contribution from the defendant. (*b*)

These cases manifestly involve ulterior questions; when and to what extent, a decree, a judgment, or a verdict may be given in evidence in another suit. (*c*) The principles upon which [261] Cases.

in indictments under statutes which give restitution, or indeed any pecuniary advantage; unless the construction of the Act itself, or public policy, require the evidence to be given. "In an indictment for perjury, on the statute of Eliz., the person injured cannot be a witness, because the statute gives him 10*l.*, though in an indictment at common law, he may be a witness;" Bull. N. P. 289. Upon an indictment founded on the stat. 21 J. 1, c. 15, or 8 H. 6, c. 9, whereby justices are empowered to give restitution, for the possession of lands entered upon by force, or holden by force, to the respective tenants thereof; the tenant whose land has been entered upon or entered by force, is not a competent witness; R. *v.* Williams, 9 B. & C. 549.

(*a*) Foster *v.* Williams, Cowp. 621; Bourne *v.* Turner, 1 Str. 632.

(*b*) Brown *v.* Brown, 4 Taunt. 752; but a co-partner against whom no proceedings have been taken, though he acknowledges himself to be such, may prove a debt; because it is clearly against his own interest; Blackett *v.* Weir, 5 B. & C. 385; and see Taylor *v.* Cohen, 12 Moore. 219.

(*c*) [By the stat. 3 & 4 Wm. 4, c. 42, s. 26, "In order to render the rejection of witnesses on the ground of interest less frequent," it was enacted, "That if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the *action* in which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined; but, in that case, a verdict or judgment in that action in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him; nor shall a verdict or judgment against the party, on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him." And, by s. 27, it was also provided, "That the name of every witness objected to as incompetent on the ground that such verdict or judgment would be admissible in evidence for or against him, shall, at the trial, be endorsed on the record or document on which the trial shall be had, together with the name of the party in whose behalf he was examined, by some officer of the Court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict or judgment shall be offered in evidence."

In a case in Equity, before V. C. Sir L. Shadwell, (in 1834,) when it was proposed to remove the incompetence of a witness, according to the provisions of this enactment; although it was objected that it appeared, by the language of the Act, it was not intended to apply to suits in equity; the Court seems to have thought otherwise: and the Vice-Chancellor laid down the principle that "if an Act of Parliament establishes a new rule of Evidence, it ought to be adopted by Courts of Equity;" and added that he would direct the entry which the Act required to be made in the decree: the deposition was accordingly read; Wheat *v.* Graham, 7 Sim. 63. But this enactment has since, however, been held, from the wording of it, to be meant to apply to Courts of Law exclusively, and not to Courts of Equity; see Oliver *v.* Latham, 13 Law J., N. C. 140, 1 Yo. & C. 248, 1 Ph. 163, and on Appeal, 408; and see Wormald *v.* Mackintosh, 5 M. & C. 5. As to this enactment, see also

such questions depend, will be more conveniently discussed when we treat generally upon the use that can be made of records. (*a*) Some cases in which those points were raised in order to determine competency, may be mentioned here, and they, with the direct decisions on the admissibility of decrees, verdicts, and judgments, cited there, will mutually throw light upon each other. Upon a plea in abatement that the promises were made jointly with A. B., and others, A. B. is a competent witness for the plaintiff, since "if the plaintiff succeeded, A. B. would still be liable to make contribution to the defendants in case he was really a partner, and the present record would not be evidence in an action brought by them against him, to show that they alone were liable." (*b*) In a nearly similar case, where a partner had been called to prove that the defendant was never authorized to make a contract in the name of the firm, and that he had received money to his own use, Lord Ellenborough, in giving his opinion that a witness so situated was competent, said, "To illustrate this by what has here taken place; this action has been decided against the defendant; but the defendant is not thereby precluded from suing the other partners for contribution, provided he can establish, by evidence, his claim against them, as partners. The record in this action will not operate as an estoppel against him on that occasion; because there is no mutuality out of which the estoppel can legally grow, and without a mutuality there can be no estoppel. It is therefore no objection to his suing, that the record shows, that he was not a partner. If it could be used for that purpose, the objection might be good;
[262] but this record can only be used as a medium of proof, to show that the now defendant has paid a certain sum of money." (*c*) In another case a question arose, whether a verdict could ever be used against him, under the following circumstances. In replevin, the defendant avowed that the plaintiff and T. B. were

Burrows *v.* Gradin, 3 Dowl. N. S. 213; Stewart *v.* Barnes, 1 Mood. & Rob. 472, and some observations by Mr. Phillipps, in the 9th ed. of his Work on Evidence, p. 148. *Et vide supra*, p. 336, n. (*e*).]

(*a*) *Vide infra*, P. III. ch. 1, § 2.

(*b*) Crossham *v.* Goldney, 2 Stark. 415.

(*c*) Hudson *v.* Robinson, 4 M. & S. 475.

jointly his tenants, and that he had taken corn as a distress because their rent was in arrear; the plaintiff having denied the tenancy *modo et formâ*, it was not proved, at the trial, that T. B. was so connected with the plaintiff, as to be jointly liable for the rent; nor was it shown that the corn was their joint property: T. B. was then tendered, to prove that the holding was under a corn-rent, and was rejected;—improperly, because as Mr. Justice Bayley said, "The judgment in this case, whichever way it was given, could not be evidence in any other proceeding, for or against T. B., as to the point decided, which was a question of tenure."(*a*) In an action of trespass, for cutting furze, the defendant gave evidence of an exclusive right of possession; nevertheless persons claiming a right of common over it were heard as witnesses, because they could not be affected by the record. (*b*) Where, in ejectment against a devisee, the question turned upon the sanity of the testator, at the time of making the will; it was held that an executor, who took a pecuniary interest under the will, was a competent witness to support it, because the verdict would only have the effect of establishing it as to the real property, and would not be evidence for it in the Ecclesiastical Court. (*c*) A witness who is *primâ facie* liable, as one who has purchased goods in his own name, has been held incompetent to prove the liability of others, Lord Ellenborough saying, in such a case, "If he was the agent of the defendants, there is no reason why this circumstance may not be proved by other evidence. Then he has a clear interest, without any counterbalance, in the event of this action; if it succeeds the verdict will be evidence for [263] him, in an action against himself, to which he is *primâ facie* liable. The remedy, which it is supposed he would have, against the defendants, if he were sued upon this contract, cannot be thought to render it a matter of indifference to him, whether the plaintiff shall succeed in this action, or be driven

(*a*) Bunter *v.* Warre, 1 B. & C. 693; he adds that if the interest "had appeared on the *voire dire* it would have been difficult to show that T. B. was competent," seeing that perhaps "the sum recovered by the defendant might have been a measure for contribution to be made by T. B."

(*b*) Pearce *v.* Lodge, 12 Moore, 50.

(*c*) Wood *v.* Teage, 5 B. & C. 335.

to sue him as the real purchaser of the goods. He is not in the situation of a broker, for the broker buys and sells in the name of his principal, and has no personal liability to be discharged by the effect of his evidence."(*a*)

Remote consequences of decree, &c.

The remote consequences of a decree will sometimes demand attention. If a man has sold land with covenants for title, &c., he cannot be a witness for the vendee to prove the title; though he may if he has sold the land without covenant or warranty. (*b*) In actions grounded on acts of negligence, on the part of the defendant's agent or servant, of such a nature that it could not be the negligence of the employer, (*c*) the servant or agent is not allowed to disprove the negligence; (*d*) for in a subsequent action brought against the servant or agent by the employer, the verdict would prove the fact that he had actually received an injury. This principle will manifestly apply to every instance of indemnity, whether general or particular, and to every case where, if damages be given against the defendant, he will consequently have a right of action over against the witness.

Where verdict measure of damages.

[264]

It may be observed here that, judicial opinions have differed on the question, whether, when a verdict would serve only for a measure of the damages, in a future action which might be brought against a witness, the evidence can be admitted. In *Green* v. *The New River Company*, that is laid down as the reason why, in general, in an action against an employer, for injury done by a negligent servant, the servant cannot be permitted to disprove his negligence. (*e*) But in other cases it has seemed that that use of the verdict was too remote to cause incompetency; (*f*) particularly where it has not appeared

(*a*) M'Brain *v.* Fortune, 3 Camp. 317. But the cases on this point are very difficult to be reconciled: sometimes the principle of necessity restores the competency of the witness, and sometimes he has been allowed to prove his own agency, on the ground that his liability to each party was equal; as in Ilderton *v.* Atkinson, 7 T. R. 480, and cases cited there; but see Buckland *v.* Tankard, 5 T. R. 578, and see Birt *v.* Kershaw, 2 East, 461, and Wright *v.* Wardle, 2 Camp. 200; Ripley *v.* Thompson, 12 Moore, 55; Taylor *v.* Cohen, 12 Moore, 219.

(*b*) Busby *v.* Greenslate, Str. 445; and see Rothero *v.* Elton, Peake's Ca. 84.

(*c*) Cuthbert *v.* Gostling, 3 Camp. 516.

(*d*) Miller *v.* Falconer, 1 Camp. 251; Morish *v.* Foote, 2 Moore, 508.

(*e*) 4 T. R. 589.

(*f*) Nix *v.* Cutting, 4 Taunt. 18.

whether the fault of negligence may not have lain in the directions given by the Master. (*a*)

Where witness might be liable over for the costs.

The Courts have gone to a greater length in rejecting a witness who might (considering the circumstances proved,) be liable for the costs; Mr. Justice Littledale said, in *Larbalestier* v. *Clarke*, "It is now well established that, a person who has received money, due from a defendant to a plaintiff, is not a competent witness, for the defendant, to prove that he received the money as agent for the plaintiff, or in his own right, if his conduct has been such that he would be liable, in the event of a verdict for the plaintiff, to pay the defendant not only the money received, but the costs of that action in which the plaintiff should recover; since in such a case he has an interest in defeating the action." He regrets that such a rule had been established, on account of the difficulty, in many cases, of ascertaining whether a party so situated would be liable to answer for the costs; and the reporter observes that the "rule is easy of application where the witness, by his engagement, express or otherwise, is clearly liable in a particular event to one of the parties; as where such party has accepted a bill for his accommodation, or become his surety: but it seems calculated, in some instances, to introduce collateral inquiries of considerable difficulty and extent; especially where a misconduct, in the nature of deceit, is the alleged ground of the witness's liability." (*b*)

[265]

Objections to this test of competency.

In the foregoing pages, the single question whether the witness can or cannot be affected by the decree or verdict, has been taken as the test of his competency; because that has been referred to, in all the late decisions; and it appears to be at once the simplest and the most comprehensive rule, and the only sure ground upon which we can rest. It ought not, however, to be forgotten that there are objections to this test. They were forcibly urged by Lord Abinger, late C. B., when

(*a*) See Lord Ellenborough's observations in Cuthbert *v.* Gostling, 3 Camp. 518; and see Bunter *v.* Warre, 1 B. & C. 693. The remoteness of the probability of an action has been sometimes taken into consideration in other cases, see Carter *v.* Pearce, 1 T. R. 163.

(*b*) 1 B. & Ad. 899; but see the cases cited there.

at the Bar, in the case of *Lancum* v. *Lovell.* (*a*) The reader who has carefully perused the last few pages, will be able to give their due weight to his arguments; but will not of course forget that they formed part of the speech of an advocate. He said, "I have a great and unfeigned respect for the memory, judgment, and learning of the late Lord Tenterden; but it appeared to me, that in this point, he was very apt to generalize rather too much, and to apply the rule of verdict and judgment in evidence rather too generally; it is a very good test, but not an infallible test; it may be a very good mode of illustrating the argument, that the witness is interested, but it is not conclusive that therefore he ought not to be a witness. Put the ordinary case of an action brought against the master or owner of a ship, or a stage-coach, for negligence in running down; there the master's servant shall not be a witness for him, without a release; and that (it is very common to say) because the verdict and judgment is evidence against him. I beg to say that is not the reason;—it is not because the verdict and judgment is evidence against him; it is because he has a direct interest to prevent an action being brought against him, which would equally lay against him, whether there was a verdict or not," &c. &c.

Exceptions.

The rule has also several exceptions, some of which have been alluded to in quoting from the cases; they will be here more distinctly enumerated.

Minuteness of interest.

How far the minuteness of the interest affects the question, has been already discussed; but it may be mentioned here that

[266]

a series of cases have established an anomalous, and, as it has been judicially termed, an unreasonable rule;—that a defendant

Defendant allowed to discharge himself as to sums under 40*s.*,

may, by his answer alone, unsupported by any evidence, or by his oath before the Master, discharge himself of sums under forty shillings, so that they do not amount in the whole to £100. (*b*) But he must mention all the particulars, to whom

(*a*) Exch. Chamb. 10th Jan. 1833. The case is reported in 9 Bing. 465, but the quotation is from the short-handwriter's notes.

(*a*) Everard v. Warren, 2 Ch. Ca. 240; 1 Eq. Ca. Abr. 11, where Mr. Pooley adds, "This is now the established practice in Chancery;" see also Wycherly v. Wycherly, 1 Vern. 470; Marsfield v. Weston, 2 Vern. 176; Anon. 2 Freem. 136; 2 Eq. Ca. Abr. 8.

they were paid, and for what, and when: (*a*) and he must swear peremptorily. (*b*) The rule holds good for all parties accounting in the Master's office. —swearing explicitly and peremptorily.

A witness is not incompetent who has an equal interest with respect to each party; (*c*) as a pauper in a settlement case, whose claim to maintenance is the same whichever parish prevails. Thus a person acknowledging that he received money as an agent, may prove whether he received it for the plaintiff, or for the defendant. (*d*) Where an indorser on a note had received money from the drawer to take it up, Lord Ellenborough admitted him as an indifferent witness, in an action by the indorsee against the drawer; for he said, "He must either be liable to the plaintiffs, as indorser of the bill, or to the defendant, for the money received by him in order to discharge it." He added, "It is true that in the latter case, if these plaintiffs recover, he may also be liable to the defendant for the costs of this action; but that argument was urged in *Ildeston* v. *Atkinson* without effect. This record though evidence of the fact of such recovery, would not relieve the defendant in such an action against the witness, from the proof of his having paid money to the latter for the purpose of satisfying the bill. I know of no other than the case of *Buckland* v. *Tankard*, which goes on the ground of more or less difficulty in the witness in establishing his interest against one or other of the parties." (*e*) In a later case however it was held that the liability to the recovery of costs, destroys the equilibrium of interest. (*f*) Balance of interest. [267]

An interested witness will be admitted, if he has acquired his interest, by his own act, after the party, who calls him as a witness, had a right to his evidence; "and therefore though one who lays a wager, at the time of the original wager is no Interest acquired afterwards.

(*a*) Anon. 1 Vern. 283.
(*b*) Robinson v. Cumming, 2 Atk. 410.
(*c*) [Smith v. Biggs, 5 Sim. 391.]
(*d*) Evans v. Williams, 7 T. R. 481, note; (where Lord Kenyon says, "If I recollect right, the point has been decided in the cases of subtraction of tithes"); Ilderton v. Atkinson, 7 T. R. 480. [And see Barker v. Baker, Wightw. 397.]
(*e*) Birt v. Kershaw, 2 East, 458.
(*f*) Jones v. Brooke, 4 Taunt. 464; and see the cases cited there; Bull. N. P. 290.

had a right to be freemen, though it appeared that there were commons belonging to the freemen, yet an alderman was admitted to prove them no freemen, it appearing that none but aldermen were privy to the transactions of the corporation, with regard to making persons free. (*a*) So where a son having a general authority to receive money for his father, had received a sum and given it to the defendant, his evidence to that effect was admitted, for his father, in an action of trover, for the money. (*b*) So in trover against a pawnbroker, the servant embezzling his master's goods and pawning them will be admitted to prove the fact. (*c*)

For the second reason no person is incompetent to prove a public right, as a right of way, every one of the King's subjects being interested in it. So in an action for a toll claimed in a public road, persons who have refused to pay the demand are, from necessity, competent to give evidence, notwithstanding their interest in the result of the cause. (*d*) Sometimes the interest is made general by the act of Parliament which creates it. (*e*) It will be required to be shown in every case that under the circumstances the necessity actually exists. (*f*)

Where party precluded from objecting.

An interested witness sometimes escapes incompetency when the person who might take advantage of the decree or verdict against him, is in any way precluded from doing so. (*g*)

Restoration of competency.

Lastly there are means by which competency may be restored.

[270]

Order of Court.

It has already been seen that under an Order of the Court, even a party to the record may be made a witness. (*h*)

(*a*) These 'three' cases are quoted from Bull. N. P. 289.

(*b*) Anon. Salk. 289.

(*c*) Anon. Bull. N. P. 290. And see Mr. Justice Ashurst's judgment in Bent *v.* Baker, 3 T. R. 31.

(*d*) Lancum *v.* Lovell, 9 Bing. 465, and see the cases cited there. The Judges did not there directly overrule the case of Falmouth Lord, *v.* George, 5 Bing. 286; for they said they did not think it worth while to discuss whether it would be possible to support that case by supposing it savoured more of a private than of a public right.

(*e*) Gilb. on Ev. 131; R. *v.* Luckup, Willes, 425, note.

(*f*) See Green *v.* New River Comp., 4 T. R. 589. [A witness to a will who was disinterested at the execution, and also at the death of the testator, is not incompetent if since become interested; Brograve *v.* Winder, 2 Ves. jun. 634.]

(*g*) Thomas *v.* Pearce, 5 Pri. 547. [And it may be here again observed, that Courts of Equity whilst admitting the same rules of evidence as at law, allow some relaxation of them, in cases of fraud, trust, and the like; Man *v.* Ward, 2 Atk. 228; and see Lupton *v.* White, 15 Ves. 443. *Et vide supra*, p. 6, n. (*a*).]

(*h*) *Supra*, p. 338.

The objection on the score of interest may be waived; (*a*) either expressly, (*b*) or by implication. The latter occurs when a party adopts the interested person as a witness, by examining him. The inconvenience would be excessive if a party were permitted, as the saying is, to play fast and loose with his evidence,—to use it if it suited his purpose, or turn round upon his own witness, as soon as he found him giving his testimony adversely. Lord Eldon therefore thought that this point ought to be looked to very cautiously. He said, on one occasion, "The party may indeed waive the objection to competence, and in a case in which it was not made abundantly clear that, at the date of the examination of the witness, the party had not a knowledge of the objection to competence, I should be inclined to hold that he had waived it." (*c*) In another case Lord Eldon showed his readiness to imply a waiver: it was contended before him that a certain individual "might be called at law so as to make it impossible that he could do any harm or any good, viz. by first stating his interest and so discrediting him before the examination;" but he answered, "As to that, at the Old Bailey the Judges would not permit that to be done, even upon the examination in reply, holding that you give him credit by calling him; and they would not permit you to breathe a suspicion against him, if you did not like his cross-examination. That, I was informed, had been settled upon conference by all the Judges." And he proceeded to decide the question before him according to that rule. (*d*)

Waiver of objection.

But whether, in equity, cross-examination on the merits amounts, under any circumstances, to a waiver, as it does at law, is not quite clear. Mr. Bell once stated, in argument, "according to the ancient practice, by cross-examination to the merits, ob-

[271]

Whether cross-examination a waiver.

(*a*) When the party chooses to waive the objection, the witness cannot raise it himself, see *ex parte* Chamberlain, 19 Ves. 481.

(*b*) At law it is frequently done, in open Court; Norden *v.* Williamson, 1 Taunt. 378. A party to a deed, who, knowing that a person was interested, had requested him nevertheless to attest it, was taken to have expressly waived the incompetency of that attesting witness; Honeywood *v.* Peacock, 3 Camp. 196.

(*c*) Vaughan *v.* Worrall, 2 Swanst. 400; and see Turner *v.* Pearte, 1 T. R. 717.

(*d*) Fenton *v.* Hughes, 7 Ves. 290.

jections to competence are waived,—a point of familiar occurrence in tithe-causes."(*a*) And it was so decided in an old case by Lord Keeper Guilford. (*b*) The direct contrary however was held in the Exchequer: (*c*) and Sir Wm. Grant finding the question thus balanced resorted to principle. (*d*) He says, "Until the depositions are published it cannot be known whether the witness has, or has not, admitted the fact upon which the objection arises. The waiver, at law, arises from pursuing the examination, after the objection to the competence of the witness is known: but it is difficult to say how an unknown objection can be waived. The witness may deny all interest in the cause; and, upon the supposition that he is competent, it may be very material to the other party to cross-examine him. Under these circumstances, the principle leads to this conclusion, that, in equity, the cross-examination of a witness, in utter ignorance of his having given an answer to an interrogatory, shewing that he has an interest in the cause, cannot amount to a waiver of the objection to his competence." There is sound reasoning in this; but the author cannot help thinking, that Sir J. Leach overstepped the proper limit, when he held that a party who cross-examined a witness to the merits, when his interest appeared on the face of the pleadings, did not waive the incompetency. (*e*) It must, however, be borne in mind, that the party cross-examining can never be sure, that the examination in chief may not shew the restoration of competency, by means of a release or otherwise. Where the party who had cross-examined read the depositions, there was no doubt of his having waived the incompetency. (*f*)

When not.

[272]

Effect of laches.

It has been mentioned before that after publication it is too

(*a*) In Vaughan *v.* Worrall, 2 Swanst. 296.

(*b*) [Where the witnesses were not only cross-examined as to whether they were members of the corporation, but also as to questions involving merits;] Corp. of Sutton *v.* Wilson, 1 Vern. 254; he was however certainly exerting his astuteness to find a ground upon which to declare the witness competent.

(*c*) In Scott *v.* Fenwick, Gwil. 1250.

(*d*) In Moorhouse *v.* De Passou, 19 Ves. 434; S. C. Coop. 300.

(*e*) In Harrison *v.* Courtald, 1 Russ. & M. 428; and see Pigott *v.* Croxall, ibid. note. [But see Ellis *v.* Deane, 3 Moll. 48; S. C. 1 Beat. 5.]

(*f*) Charitable Corporation *v.* Sutton, 2 Atk. 403.

late to obtain leave, to exhibit new interrogatories, for the sake of introducing proof of a witness's incompetency; (*a*) so that laches to that extent becomes equivalent to waiver.

A bail may be relieved from his disability by setting him free from his obligation; which is done by justifying and substituting another bail. (*b*) Bail made competent.

By far the most common mode of restoring competency is by Release: that is, if the interest be against the witness, by releasing to him every claim; if in his favour, by inducing him to release all claims which he may have. (*c*) Satisfaction is very often *bonâ fide* made at the time that this is done, (as by the payment of a legacy,) (*d*) but still oftener it bears the character of a fiction of law. In the latter case it has been cried out against as a gross absurdity. Lord Brougham, in his speech, in 1828, on the State of the Law, strongly vituperates "the shifts resorted to for the purpose of restoring the competency of interested witnesses," and continues, "I allude of course to that notable expedient, a release of all actions or causes of action. When a witness has an interest, if he is deprived of it by a release, there is no objection to his competency. Evidence is thus often cooked up for the Court—nay, in the Court, while the witness is in the box—which according to the existing rules, is not admissible without such a process. Now what is the real effect of the release on the mind of the witness? Just nothing—for if he be an honourable man, (*e*) he gives it up the moment he leaves the box, and, while swearing, he knows that he is to do so; so that the operation which has been performed upon him, adds a pound to the year's revenue, [(alluding to the stamp,)] nothing to the credit of his testi- Restoring competency by release;

[273]

(*a*) *Supra*, p. 330.

(*b*) Tidd's Pr. 7th edit. 282.

(*c*) [Anon. 2 Atk. 15; Anon. 2 Eq. Abr. 397; and see Wolley *v.* Brownhill, cited fully below.]

(*d*) It was long a *vexata questio* whether this restoration of competency was retrospective; and especially whether a subscribing witness who had a legacy, might, after it had been paid, or he had given a discharge for it, prove the will; but his competency has been now for many years undisputed. See 1 Phil. on Ev. 125, note. [As to wills since 1837, the stat. 7 Wm. 4, and 1 Vict. c. 26, is, as we have had so often occasion to notice, furnishes the rule as to competency of attesting witnesses.]

(*e*) [*Semble*, Lord B. was speaking as in the play,—"For Brutus is an honourable man," &c., and not in any more strict sense. But evidently such a man may be trusted as a witness well enough.]

mony." There is much truth in this; but there is also truth in what Lord Wynford said in *Hovill* v. *Stephenson*, (*a*) namely, that if a person "declines releasing his interest, whatever may be its amount, it seems that he feels it of importance to him; and therefore he cannot be trusted as a witness, in a suit instituted for the recovery of it." (*b*) In this view it may be considered, in a great number of cases, as a test whether or no the interest of the witness is sufficiently strong to influence and bias his mind. (*c*)

not always feasible.

It should also be remembered that the operation of this mode of restoring competence is not universal, and that many persons against whom the objection of interest would most strongly and most justly lie, are not permitted to be qualified by a release. Thus, it would of course be out of the question for one of the actually litigating parties on the record to release all claims on his opponent. So a person who is not nominally, but virtually, a party, has difficulties in his way which sometimes amount to an impossibility of qualifying himself as a witness. Where an action of assumpsit was brought by agents, (brokers,) to whom A., the principal executed a release; A. moreover assigned to C. and D. his interest in the suit, and C. and D. gave to the brokers an indemnity against the costs; Lord C. J. Abbott said, "I am of opinion that A. was not a competent witness. There can be no doubt that originally he was substantially, though not nominally, a plaintiff in the cause; and we ought not to be astute to give effect to that which makes the real plaintiff a witness. The action being for his benefit, although brought in the names of the brokers, it must, until the contrary is shown, be presumed that it was brought by him, and by his authority, rather than by those who had no interest in it. If the action was brought by his authority, either expressed or implied, he became liable to pay the attorney employed to bring it, and he

(*a*) 5 Bing. 497.

(*b*) [Depositions of a witness who states himself to have been interested in the cause, but duly released, cannot be read, until the Court has, by inspection of the document creating such interest and release, satisfied itself thereon; Wolley v. Brownhill, 1 M'Clel. 321.]

(*c*) [The "honourable man," has now by stat. 6 & 7 Vict. c. 85, no shield of defence against the imputations which may be thrown on his *credit*, failing the objection of incompetency.]

is still under that liability, nothing having been done to deprive the attorney of his right to recover his costs from him. The machinery therefore, (notwithstanding all the contrivances adopted,) has still left this objection open; and upon this ground [274] alone, without going further, I think that there is sufficient to warrant us in saying that A. had an interest in obtaining a verdict for the plaintiffs. He was therefore improperly admitted to give evidence. (*a*) This objection was held to be one which could not be removed, where a witness produced by the defendant was shown to be a co-partner with him in the subject of the action; he was rejected, even although the tendency of his proffered evidence was to charge himself with the whole debt, and though the defendant offered to release him. (*b*) To a bankrupt the want of his certificate, (of which we have before spoken,) is a disqualification which no release can remedy; after that has been obtained, he can be rendered competent. It was contrived in the following manner in an action on the stat. 9 Anne, c. 14, brought by the assignee to recover money lost by the bankrupt at play: three releases were given; the first by the bankrupt to the assignee; the second by all the creditors to the bankrupt; the third by the assignee (who was not a creditor) to the bankrupt. (*c*) A residuary legatee was not rendered competent, (in an action by the executrix for a debt,) by releasing all claim to the debt in question; because, as Lord Ellenborough said, "if the plaintiff failed in the suit, although she would not be liable for the costs to the opposite side, she must pay costs to her own attorney: these she would be entitled to be allowed out of the estate, the action being brought *bonâ fide;* and thus, independently of the debt to be recovered, the *residuum* would be diminished: therefore after

(*a*) Bell *v.* Smith, 5 B. & C. 188; see the arguments there, and the cases cited; and see Brind *v.* Bacon, 1 Taunt. 183.

(*b*) Simons *v.* Smith, 1 R. & M. 29; but see Young *v.* Bairner, 1 Esp. Rep. 103; Cheyne *v.* Coops, 4 Esp. Rep. 112.

(*c*) Carter *v.* Abbott, 1 B. & C. 444. It was also held in that case that a year after the commission had issued, it might be presumed that all the creditors had proved, and that a release signed by all those who had proved might therefore be considered as a release by all the creditors; and moreover that such a release did not destroy the assignee's right of action. [*Et vide supra*, as to Creditor's and Bankrupt's Evidence, p. 353-4.]

releasing all right to that debt, the witness has still an interest to support the action; and could only be rendered competent
[275] to give evidence, for the plaintiff, by releasing the residue altogether, or by the attorney releasing to the plaintiff the costs of the action. (*a*)

Release and re-examination not allowed.

In *Vaughan* v. *Worrall* the plaintiff moved to suppress the depositions of two of his own witnesses, then to have a new commission—"to examine the said J. O. and T. W., to the several matters they had been previously examined to, in the cause; and for that purpose, to exhibit the first interrogatories exhibited on the part of the plaintiff under the first commission, and also to exhibit proper interrogatories, to examine other witnesses, to prove proper releases and discharges to the said J. O. and T. W., from any thing that might affect their competency, as witnesses in the cause;" but Lord Eldon declared it was "a novelty to him to hear it said that, if it appears that a witness was interested at the time of the examination, this Court knows any such practice as that, a release being given, the witness may then be re-examined. I believe," he continues, "that that never was done in any well considered case." (*b*)

General release.

It is usual to release specially the particular interest which causes the disqualification, whether a *bonâ fide* satisfaction is actually made at the time, or not; but a general release will always answer the purpose. In *Scott* v. *Lifford*, (*c*) it depended upon the event of the suit, whether the defendant, who was the drawer of a bill of exchange, would have a right of action against the witness, who was the acceptor; the defendant executed a general release—"unto the said witness, his heirs, executors, &c., of all actions and causes of action, &c., which he the said defendant then had, or which he, his heirs, executors or administrators should or might, at any time thereafter, have

(*a*) Baker v. Tyrrhwitt, 4 Camp. 27.

(*b*) There is however an old case in which it was done, Callow v. Mince, Ch. Prec. 234; 2 Vern. 472. Lord Eldon avoided the question, and decided against the plaintiff; on the ground that he was aware of the interest at the time; 2 Swanst. 401. [The danger seems to be of perjury.]

(*c*) 1 Camp. 250; and see Cartwright v. Williams, 2 Stark. Rep. 340.

against the said witness, for or by reason of any matter or thing whatsoever, from the beginning of the world unto the day of the date of the said writing of release;"—and Lord Ellenborough held it sufficient, because the transaction was already past, [276] which was to lay the foundation of future liability.

Offer of a release.

An offer of a release to a witness equally restores his competency; because the parties have a right to his testimony, and he cannot be permitted to deprive them of it; by refusing to accept a full discharge. (*a*)

Release or payment, or offer, to be proved.

The release must be regularly produced and proved, as any other deed. (*b*) Payment, or the offer of payment, or the offer of a release, would be proved, according to the circumstances, in any of the usual ways. (*c*)

Other peculiar grounds of incompetency.

It will not be necessary to repeat here, what has been said in a former section, respecting various persons who, under certain peculiar circumstances, are precluded from giving any evidence in a cause; such as a commissioner after the examination of the witnesses has commenced, or a witness, who having been once examined, his examination has been suppressed.

III. Incompetency as to particular evidence.

III. The third head into which we have divided Incompetency, comprehends those witnesses who are debarred from particular branches of evidence.

Persons partially interested.

An interested witness is in general (*d*) incompetent to prove even the most trifling matters, such as the custody of a document. (*e*) But the Courts frequently allow, (and they have done so more readily of late years than formerly,) a witness who is interested in one particular point, to give evidence on all topics which do not bear precisely upon that: for instance,

(*a*) Fowler *v.* Welford, 1 Doug. 141; and see Bent *v.* Baker, 3 T. R. 27.

(*b*) Cocking *v.* Jarrard, 1 Camp. 37.

(*c*) [When a corporation would examine a member as a witness, the course is to disfranchise him by an information in the nature of a *quo warranto* against him, which in confessing judgment passes; Colchester Corp. of, *v.* ——, 1 P. Wms. 595, n.]

(*d*) [As to suits, &c. commenced prior to the stat. 6 & 7 Vict. c. 85; *v. s.* p. 326-7.]

(*e*) Carrington *v.* Jones, 2 Sim. 135. Admissions to his own disadvantage, which, if spoken or written out of Court, might be proved by other witnesses and used as evidence in the cause, will always be received by the Court.

the principle holds good also in criminal matters and may sometimes be brought in that shape under the notice of an equitable tribunal. (*a*)

Legal advisers, counsel, &c.,

[279]

On a more debatable, because a far less definite ground, counsel, [conveyancers, pleaders,] solicitors, and attornies, [advocates] and proctors, are all restricted in their testimony. They are not permitted [even if willing] to disclose any information which they may have obtained in the capacity of professional advisers. (*b*) C. B. Gilbert says, that "they are considered as the same person with their clients, and are entrusted with their secrets." (*c*) As a professional man, well acquainted with the facts and pleadings, is or ought to be, himself best able to fix the point beyond which their examination cannot properly be extended, the objection is (as in the case of public officers), generally brought before the Court in the form of a demurrer to interrogatories; (*d*) but as the right to withhold the answer is the privilege, not of the witness, but of the client, (*e*) it amounts in fact to a species of incompetency. (*f*)

(*a*) [See the subject discussed and cases cited, *supra*, p. 341, *et seq.* The case of Langley *v.* Fisher, cited above, recognises fully the ground of policy.]

(*b*) [And see the severe animadversions of Judges on those who have attempted to infringe this confidence, *supra*, p. 86, n. (*e*), *et infra*, p. 379, n. (*d*). Indeed, if the party did but believe he rightly understood a solicitor to assent to act for him, any communication made to him would most likely be privileged, as in Smith *v.* Fell, 2 Curt. 667, the Prerogative Court held: and even though the solicitor become a trustee for others, after being the solicitor, communications by his client subsequently are still privileged; Pritchard *v.* Foulkes, 1 Coop. 14.]

(*c*) Gilb. on Ev. 138. The cases are collected in Parkhurst *v.* Lowten, 2 Swanst. 194. [Early cases, Bird *v.* Lovelace, Cary, 62; Austen *v.* Vesey, ibid. 63; Hartford *v.* Lee, ibid. 63; Kelway *v.* Kelway, Cary, 89, as to solicitors, and Denens *v.* Codrington, Cary, 100, as to counsel being examined with reserve as to matters privileged by this rule. But in case of fraud this, as all other rules relaxed, as in Cutts *v.* Pickering, 3 Ch. Rep. 66; and see Vaillant *v.* Dodomend, 2 Atk. 524, the general rule.]

(*d*) *Vide supra*, p. 80. In one old case, (Sparke *v.* Middleton, 1 Keb. 505, pl. 68), the oath was administered in a peculiar form at the special request of a barrister, Mr. Aylet, though after some dispute. He was sworn "only to reveal such things as he knew before he was counsel, or that came to his knowledge since by other persons, and the particulars to which he was to be sworn were particularly proposed." This has been always considered an unnecessary scrupulousness, for the general oath, of course, tacitly reserves all legal exemptions, (see Bowman *v.* Rodwell, 1 Mad. 268): it serves, however, to define with tolerable accuracy the line which the law draws.

(*e*) Mr. J. Buller says, "it is mistaking it for the privilege of the witness that has sometimes led Judges into the suffering of such a witness to be examined." N. P. 284. This principle is so completely recognised that it holds good although the client be not a party to the suit, R. *v.* Withers, 2 Camp. 578.

(*f*) [And see observations by Lord Langdale, M. R., in Flight *v.* Robinson, 8 Beav. 35-6. It is extended to a case laid before and opinion of counsel in a

examinable by consent of the client.

One of its properties is that it may at any time be waived by the client. We have, however, already discussed at considerable length the principles on which this rule is based, while we were inquiring how far a defendant was bound to produce the written opinions which he had received from his counsel. (*a*) Two judgments of Lord Brougham's, there quoted, contain elaborate arguments on the general subject and may be very advantageously referred to. (*b*)

Professional privilege.

The reason of the rule is sufficiently obvious and has long been recognised. To cite an instance as far back as the reign of William and Mary; a witness who had proved a written agreement, being cross-examined as to what money had passed thereon, appealed to the Court, and declared that he was, and had been for many years, the plaintiff's attorney, and had been employed to draw that agreement; and therefore prayed that he might not be put to discover his client's secrets wherein he was entrusted; to which the Court assented "declaring that if this should be admitted, it would be a manifest hindrance to all secrecy, commerce, and conversation." (*c*) It is by no means necessary however that he should still continue to be the attorney of the party or that his name should appear on the record of the pending suit: when an attorney offered to prove something which he had learned from a party who no longer employed him, "Mr. Justice Buller would not suffer him to give the evidence, but strongly reproached him for his anxiety to reveal the secrets of his former client." (*d*) In *Sandford* v. *Remington*, (*e*) Lord Loughborough, on motion to suppress

[280]

Continuance ever after the relationship has existed.

foreign country, see Bunbury *v.* Bunbury, 2 Beav. 173.]

(*a*) *Vide supra*, p. 39, *et seq.*

(*b*) [An instance of the notes endorsed on a brief by counsel, at a trial at law, being used in a suit in Equity, see Cattell *v.* Corrall, 3 Yo. & C. 413.]

(*c*) Anon. 12 Vin. Abr. 37 (Ev. B. a. 1.), and Skin. 404.

(*d*) Petrie's case, cited in 4 T. R. 756; but see Winchester Bp. of, *v.* Fournier, 2 Ves 445. [For similar animadversions of Sir E. Sugden, C. of I., on the evidence of an attorney for one of the parties, who had submitted *willingly* to be examined on sixty-five interrogatories, and that after the decease of the principal, whose solicitor in point of fact he had been, whilst also acting for the other party, see Brown *v.* Kirwan, Lloyd & Gould's I. Rep. temp. Sugden, 62. And see also, (by the way,) as to one solicitor acting for several parties having different interests, the observations of Sir E. Sugden, C. of I. in Mortimer *v.* Shortall (where he refers to those of Lord Eldon, C., in 4 Ves. 631, n.) 1 Connor & L. 417.]

(*e*) 2 Ves. 189.

depositions, referred it to the Master to inquire which of the matters in the depositions came to the knowledge of the witness as confidentially attorney and solicitor. But in *Parkhurst* v. *Lowten*, (*a*), the Vice-Chancellor (Sir J. Leach) said, "*Sandford* v. *Remington* affords no rule to follow, because it is for the Court, and not for the Master, to judge whether the matter inquired of is confidential, and such as a solicitor is not bound to answer."

Scriveners. In the case quoted above from Skinner, Lord C. J. Holt laid it down that the rule applied equally to an attorney, or to a counseller, or to a scrivener. It was not so early settled with

Conveyancers. respect to conveyancers: in the *South Sea Co.* v. *Dolliffe*, a demurrer was overruled "for that what the witness knew was as conveyancer only." (*b*) Lord Hardwicke is stated to have approved of this decision, though it was not necessary for him to form a judicial opinion; for the demurrer before him alleged

[281] that the witness had obtained his information, as clerk in Court or agent of the party, and he overruled it, on the ground that it was too extensive and uncertain;—"for an agent may be only a steward or servant." (*c*) But several cases (*d*) have decided that communications respecting the preparing of deeds, are

Interpreters. privileged. (*e*) The rule includes an interpreter, so far at least as he is merely the organ of the professional adviser; (*f*) and

Clerks. the clerk of the counsel or solicitor consulted. (*g*)

(*a*) 3 Mad. 124.

(*b*) Quoted in 3 Atk. 525; he had, however, demurred for that he was "counsel." See Sandford v. Remington, 2 Ves. 189.

(*c*) Vaillant v. Dodemead, 2 Atk. 524.

(*d*) Anon. Skin. 404; Cromack v. Heathcote, 2 Brod. & Bing. 5; Walker v. Wildman, 6 Mad. 47.

(*e*) [And so with an attorney respecting raising a sum of money; Turquand v. Knight, 2 Mees. & W. 98; and see Greenough v. Gasken, 1 Myl. & K. 98; *ex parte* Aitkin, 4 B. & Ald. 49. When an attorney is under the necessity of employing an agent to collect evidence in support of proceedings at law, all the communications between them relating thereto, will be privileged from discovery; Steele v. Stewart, 1 Phil. Rep. 471; but see Dartmouth, M. of v. Holdsworth, 10 Sim. 476, on the necessity of properly pleading a ground of objection of this sort to discovery of documents; and see Bunbury v. Bunbury, 2 Beav. 173, on the danger of mixed communications.]

(*f*) Du Barrè v. Livette, Peake's cases 77, n.; cited also in 4 T. R. 756. [*Sed vide infra*, p. 384, n. (*b*).]

(*g*) Taylor v. Forster, 2 C. & P. 295; Foote v. Haynes, 1 Ry. & M. 165. [*A fortiori*, a proctor and advocate, consulted professionally, and (by parity of reason) the clerk of each.]

Privilege not extended to any other communications, however confidential.

But our law has never extended the privilege to any communication, however confidential, if unconnected with matters of law. (*a*) The usual inviolability of secrets committed to a physician is invaded if the demands of justice require their surrender; (*b*) and the still more sacred confidence which criminals often repose in their spiritual adviser receives no recognised protection. (*c*) It is a rigorous—perhaps an impolitic—rule. The Judges expressed themselves to that effect in *Wilson* v. *Rastall;* (*d*) but there was no doubt of its having been firmly established. "If," (Lord Kenyon reasons,) "the privilege, now claimed, extended to all cases and persons, Lord W. Russell died by the hands of an assassin, and not by [282] the hands of the law; for his friend, Lord Howard, was permitted to give evidence of confidential communications between them: all good men indeed thought that he should have gone almost all lengths rather than have betrayed that confidence; but still, if the privilege had extended to such a case, it was the business of the Court to interfere and prevent the evidence being given." (*e*) The House of Lords called upon two gentlemen who had received confidential communications from the Duchess of Kingston, to give them in evidence against her, Lord Camden saying, "My Lords, the laws of the

(*a*) [Instances of communications not privileged, although of that kind; Shore *v.* Bedford, 12 Law, J., N. S. 138, C. P.; and Perry *v.* Smith, 1 Car. & M. 554; Patteson, J., *et supra*, p. 380. Communications to a solicitor, although relevant, if unnecessary, held to be not privileged; Gillard *v.* Bates, 6 M. & W. 547; S. C. 8 Dowl. 774. But although not made actually in contemplation of the suit, still if in the course of the dispute, they have been protected, as in Clagett *v.* Phillips, 2 Yo. & C. 82; and as to attornies or solicitors disclosing such, see Davis *v.* Waters, 1 Dowl. N. S. 651; S. C. 9 Mees. & W. 508; see also on this subject, Stark. on Ev. 9th Ed. and Appendix.]

(*b*) Duchess of Kingston's case, Howell's St. Tr.

(*c*) It has been held that a Roman Catholic Priest must divulge the secrets of the confessional; Butler v. Moore, Macnall, 253. In truth the peculiar religious sanction there, is a circumstance of which the law cannot easily take notice in a Protestant country. [Leaving this part of this note, the Editor begs to refer to the interesting (rather than very instructive) speeches made in the House of Lords on the 2nd of May, 1845, upon the matter of a confession, supposed to have been made to a clergyman by Tawell, a quondam Quaker; afterwards hung for murder at Aylesbury. It may suffice here to refer to a case, Dubarrey *v.* Pousset, said to be in Keating's Nisi Prius, and to be in point. But, in other respects, the newspaper report seems far too incomplete to refer to here.]

(*d*) 4 T. R. 753; and see 1 M. & K. 103.

(*e*) [All "good men" in those days were liable to very strong political bias. But men who would claim the protection of the law, must obey the law; and not put their friends into such a painful position as to have to "go almost all lengths."]

land, I speak it boldly in this grave assembly, are to receive another answer from those who are called to depose at your bar, than to be told that, in point of honour and of conscience, they do not think that they acquit themselves like persons of that description, when they declare what they know. There is no power of torture in this kingdom to wrest evidence from a man's breast, who withholds it; every witness may undoubtedly venture on the punishment that will ensue on his refusing to give testimony. As to casuistical points, how far he should conceal or suppress that which the justice of his country calls upon him to reveal, that I must leave to the witness's own conscience." (*a*)

Whether the privilege is confined to the cause, *qu.*

The question whether the privilege was confined to professional communications, which relate to the pending cause, has produced much discussion of late years. (*b*) The House of Lords decided, in the case of *Radcliffe* v. *Fursman*, (*c*) that a defendant was bound to produce a statement which had been laid before counsel, not however, as it would appear, having immediate reference to the suit; and the difficulty under which Judges have felt themselves in consequence of that decision has been seen in an early part of this work. (*d*) The cases are so ably abstracted and commented upon in Lord [283] Brougham's luminous judgment in *Greenough* v. *Gaskell* (*e*) that there would be little utility in doing the same thing in other language here. The current of the authorities is there shown to have preponderated strongly in favour of the protection of all professional communications, until the time of Lord Tenterden. That learned Judge is reported, in several *nisi prius* cases, to have restricted the privilege to matters communicated during the pendency of a suit or cause, or made with a view to the institution of one. (*f*) Lord Brougham, however, ventures

(*a*) Howell's State Trials, *et supra*, p. 49.

Mr. J. Buller gives his sanction to a decision of Lord C. J. Holt to the effect that "A trustee shall not be a witness to betray the trust." Bull. N. P. 284; but it seems to be an isolated case and a dangerous principle, and it has never been followed.

(*b*) Wadsworth *v.* Hamshaw, 2 Brod. & B. 5, note; Cobden *v.* Hendrick, 4 T. R. 431.

(*c*) 2 B. P. C. 514; and see 1 M. & K. 95.

(*d*) *Vide supra*, p. 39, [p. 40, n. (*a*), *et* p. 41.]

(*e*) 1 M. & K. 98. [*Vide supra*, p. 41.]

(*f*) That is to say, *post litem motam*, the meaning of which words is discussed at p. 321: [and so is Clagett *v.* Phillips, 2 Yo. & C. 82, cited above.]

to decide in opposition to him; though he declares the rules on the subject to be the same on both sides of the Hall. Still, in deference to the decision of the House of Lords, he points out that he is throwing this wide protection over the professional adviser, while that case only extorted discovery from his client. It is not unreasonable to expect that the Courts will soon have exercised their ingenuity or authority to the extent of entirely discarding the distinction. (*a*)

Exceptions as to the privileged communications, &c.;

The other exceptions, (*b*) *sc.* cases in which the protection has been refused, have been ably condensed by Lord Brougham in the same judgment, (*c*) who states that they "all range themselves within one or other of the following heads, which are all deducible from the proposition, and in strict consistency with its terms. The apparent exceptions are, where the communication was made before the attorney was employed as such, (*d*) or after his employment had ceased; (*e*) or where, though consulted by a friend because he was an attorney, yet he refused to act as such, and was therefore only applied to *as a friend*; (*f*) or where there could not be said in any correctness of speech, to be a communication at all, as where, for instance, a fact, something that was done, became known to him from his having been brought to a certain place by the circumstances of his being the attorney, but of which fact any other man, if there, would have been equally conusant, (*g*) (and even this has been held privileged in some of the cases); (*h*) or where the matter communicated was not in its nature private, and could in no

attorney not being consulted as such, &c.

[284]

(*a*) [And see Flight *v.* Robinson, 8 Beav. 33, and cases there cited, as to production of professional communications and privilege.]

(*b*) [For convenience other and later cases collected, *supra*, p. 39, n. (*g*).]

(*c*) And see Bull. N. P. 284.

(*d*) See Croft (or Cutts) *v.* Pickering, 1 Ventr. 197; Vaillant *v.* Dodemead, 2 Atk. 524.

(*e*) See Cobden *v.* Kendrick, 4 T. R. 431.

(*f*) See Wilson *v.* Rastall, 4 T. R. 753.

(*g*) Lord Mansfield says in Doe d. Jupp *v.* Andrews, Cowp. 846, "An attorney has no privilege to refuse to give evidence of collateral facts: I have known an attorney obliged to prove, his client's having sworn and signed the answer, upon which he was indicted for perjury." Lord Loughborough said in Sandford *v* Remington, 2 Ves. 189, "This witness (a solicitor) may be called on to disclose all that did pass in his presence at the execution of the deed as a witness; so his having been sent by his client with orders to put the judgment in execution; that is an act: but he is not to disclose the private conversation as to the deed with regard to what was communicated as to the reasons for making it, &c." Still the expressions of Lord Brougham are a little too strong.

(*h*) See R. *v.* Watkinson, 2 Str. 1122.

sense be termed the subject of a confidential disclosure; (*a*) or where the thing disclosed had no reference to the professional employment, though disclosed while the relation of attorney or client subsisted; (*b*) or where the attorney made himself a subscribing witness, and thereby assumed another character for the occasion, and, adopting the duties which it imposes, became bound to give evidence of all that a subscribing witness can be required to prove." (*c*)

The information protected, however obtained.

Information obtained professionally will be protected although it may not have come directly from the client; when, for instance, it is communicated by a third person who has accompanied the client to his attorney; (*d*) and in every case what has been gleaned in collecting evidence for the trial or hearing must be sacred. (*e*) Yet if the client or the attorney should be so careless as to let his conversation be overheard, the earwitness may repeat it. (*f*)

Parents not to bastardize issue.

[285]

There is a rule, "founded," to use the expressions of Lord Mansfield, "in decency, morality, and policy, that parents shall not be permitted to say, after marriage, that they have had no connexion, and therefore that the offspring is spurious; more especially, the mother, who is the offending party." (*g*) He adds, "That point was solemnly determined, at the Delegates;" but he says in another place, "The law of *England* is clear that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage." (*h*) This must not, however, be understood to mean that they may not give evidence against the validity of their own marriage;

(*a*) See Spenceby *v.* Schullenberg, 7 East, 357; Stratford *v.* Hogan, 2 B. & B. 166.

(*b*) So words addressed *to*, not *through*, an interpreter, De Barrè *v.* Livette, Peake's Rep. 77.

(*c*) See Lord Say and Sele's case, 10 Mod. 40; R. *v.* Dixon, 3 Burr. 1687.

(*d*) R. *v.* Withers, 2 Camp. 579; and see Robson *v.* Kemp, 5 Esp. 52.

(*e*) [*Et vide supra*, p. 380, n. (*e*).]

(*f*) Gainsford *v.* Grammar, 2 Camp. 10. [Whereupon a solid ground for caution may be laid, that with regard to communications of this nature, none but the privileged parties be present.]

(*g*) [As to the old common law, presumption in favour of the legitimacy of the child, and the rebuttal by evidence, see Morris *v.* Davis, 5 Clark & Fin. 163. Non access is not presumed from the fact of the wife's living in adultery with another; to establish illegitimacy there must be evidence from which a jury can infer non access; R. *v.* Mansfield, 1 G. & D. 7.]

(*h*) Stevens *v.* Moss, Cowp. 591. And see R. *v.* Bedell, Lee's Rep t. Hard. 379; R. *v.* Kea, 11 East, 132; Bull. N. P. 113.

though then, [as it has been expressed,] "they come forward under a cloud of suspicions." (*a*)

Party to invalidate instrument.

Somewhat similar to this was the rule which the four Judges of the King's Bench, in *Walton* v. *Shelley*, (*b*) held to be clear law, *viz.* "that no man shall invalidate his own instrument." Lord Mansfield states it thus, (after deciding that in point of interest there was no objection to the competency of the indorser of a note), "But what strikes me is the rule of law, founded on public policy, which I take to be this,—that no party who has signed a deed or paper shall ever be permitted to give testimony to invalidate that instrument which he hath so signed. And there is sound reason for it; because every man who is a party to an instrument, gives a credit to it. It is of consequence to mankind that no person should hang out false colours to deceive them, by first affixing his signature to a paper and then afterwards giving testimony to invalidate it. It is emphatically right in the case of notes;" &c. It was soon however found in practice that this doctrine could not possibly be maintained. The case of *Bent* v. *Baker* (*c*) escaped its authority by confining it to negotiable securities; and soon afterwards, in *Jordaine* v. *Lashbrooke*, (*d*) it was directly attacked, and completely overthrown. Mr. Justice Ashurst indeed defended it, on the maxim of the civil law,—*nemo allegans suam turpitudinem est audiendus;* but the other Judges answered, that "persons are continually allowed *suam allegare turpitudinem*, as in cases of simony, compounding felony, sale of offices, &c. (and possibly that maxim may in our law be confined to the cases of plaintiffs making demands *ex turpi causâ*, and to such cases of defence in which innocent persons may be prejudiced"),—that innocent persons are prejudiced here by the exclusion of this evidence,—that a material witness might

[286]

(*a*) Lord Thurlow in Standen *v.* Edwards, 1 Ves. 134; and see St. Peter's Worcester *v.* Old Swinford, Bull. N. P. 112; Standen *v.* Standen, Peake's Rep. 45.

(*b*) 1 T. R. 296. In Anon. 12 Mod. 345, the objection of interest was considered fatal against the drawer, but cured by a release; so in Rich *v.* Tapping, Peake's Rep. 293.

(*c*) 3 T. R. 27; and see Adams *v.* Lingard, Peake's Rep. 159.

(*d*) 7 T. R. 601; and see Jones *v.* Brooke, 4 Taunt. 464; Rands *v.* Thomas, 5 M. & S. 246; Title *v.* Grevett, Ld. Raym. 1008.

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[287]

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(*b*) Earle *v.* Pickin, 1 Russ. & M. 547. [Indeed admissions and conversations, to be proveable in evidence, should be thus put in issue; *vide supra*, p. 229, n. (*a*). As to hearsay evidence of declarations of the parties, *vide infra*, Admissions.]

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render himself incompetent, by merely indorsing a note,—and that the case could not be distinguished from that of witnesses to deeds and wills, who are always admitted to impeach them. (*a*) On this last point, Lord Eldon, in a case where an agent, who had signed an agreement, afterwards denied his authority, expressed himself thus;—"With respect to a class of cases referred to on the part of the plaintiff, I think that the judicial opinions against giving credit to persons, who, having attested wills, are afterwards called to impeach the execution; has been carried rather too far. Lord Mansfield often said, he would hear those witnesses, but would give no credit to them. Lord Kenyon followed him in that. I have differed from both those great Judges, and have acted upon my opinion to this [257] extent, that if the witnesses are to be heard, their credit is to be duly examined: (*b*) but their testimony is to be received with all the jealousy necessarily, for the safety of mankind, attaching to a man, who upon his oath asserts that to be false, which he has by his solemn act attested to be true." (*c*)

Subscribing witnesses to invalidate instruments attested by themselves.

(*a*) Lowe *v.* Joliffe, 1 Bl. Rep. 365, 416, affords a remarkable instance of this. The defendant called the three witnesses to a will, who all deposed to the testator's incapacity, but "upon the whole it appeared to be a very black conspiracy, to set aside this gentleman's will;" and after the trial, (at bar), Lord Mansfield declared himself fully persuaded that all the defendant's witnesses, being nineteen in number, were grossly and wilfully perjured; and called for the subscribing witnesses in order to have committed them in Court, but they had withdrawn themselves." They were afterwards caught, condemned, and set in the pillory, opposite Westminster Hall. Yet a doubt was thrown upon the admissibility of subscribing witnesses, by the ill-reported case of Alexander *v.* Clayton, 4 Burr. 2224; and Sir Wm. Grant speaks hesitatingly on the subject, in Burrowes *v.* Locke, 10 Ves. 474. [In a case at law, when fraud was suspected, the witness was cross-examined, to show that the consideration money had not passed, although the usual receipt clause was endorsed; Doe *v.* Carr, 1 Carr. & M. 123.

(*b*) [As (under the late statute) is that of a similar class of witnesses, heretofore excluded; *vide supra*, p. 326, *et* n. (*a*).]

(*c*) Howard *v.* Braithwaithe, 1 V. & B. 209. He there allows one who had signed an agreement in the character of an agent to deny that he had any authority.

SECTION V.

OTHER OBJECTIONS.

OTHER objections might be enumerated here, but they are of far less extensive application than the preceding, or at least they less frequently call forth discussion. Consequently many of them are merely alluded to, incidentally, in mentioning the topics with which they are connected, and the rest will occupy so little space that they may be included in one section.

Some have analogous rules at common law, which are based upon the same principle, and with which they correspond; but they differ in consequence of the other differences between *vivâ voce* and written examinations.

Cross-examination, when examination in chief has not been used.

Of this description is the rule,—that a cross-examination may not be read, unless the party who produced the witness makes some use of the examination in chief. (*a*) At law, a cross-examination could not even come into existence, unless the adverse party first called the witness. (*b*) Equity follows, as closely as possible, refusing to recognise the existence of the cross-examination; but it is not easy to see why the party who obtained it should not use it like an examination in chief, unless indeed it were on a point which the interrogatories in chief did not touch upon. (*c*)

[288]

Proving a negative.

Of the same description is the objection to evidence that it is attempting to prove a negative. This is founded much more on the nature of things, than on any technical rule; for in most cases where it applies, a moment's reflection will sug-

(*a*) Smith *v.* Bigge, 5 Sim. 392.

(*b*) [At law when a party calls his own attorney, as a witness, the other party may cross-examine him; Vaillant *v.* Dodomead, 2 Atk. 524.]

(*c*) [It may be here mentioned,—if on cross-examining a witness in bankruptcy, an irrelevant question be put, you cannot produce evidence to disprove his answer; but must take it for better or worse; *Ex parte* Arnsby, 2 Dea. & Ch. 213.]

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[290] to call upon the defendant to give *primâ facie* evidence at least, of a marriage. (*a*)

(*a*) Doe d. Banning *v.* Griffin, 15 East, 294. [Of many facts *primâ facie* evidence is sufficient to throw on the other side the *onus probandi*, if the contrary be contended by that side; as in the Banbury Peerage case, 1 S. & S. 155; S. C. 15 Ves. 432; Williams *v.* Lonsdale Lord, Dan. 171; Chalmer *v.* Bradley, 1 Jac. & W. 65. And as to lunacy, Hall *v.* Warren, 9 Ves. 611; White *v.* Wilson, 13 Ves. 88.

As to what is *primâ facie*, evidence in certain cases:

An I. O. U. signed by the defendant, although not addressed to the plaintiff, is *primâ facie* evidence of having been given to the plaintiff; and it lies on the defendant to show it was given to any other; Curtis *v.* Rickards, 1 Man. & Gr. 46, and S. C. 1 Sc., N. S. 155. In general a proper receipt is *primâ facie*, (though not conclusive) evidence of a payment, *vide supra*, p. 187, n. (*c*), and 1 Phil. on Ev. 368-9, and notes, and cases there cited. That cheques on bankers paid are *primâ facie* evidence of a debt, from the bankers to the drawers, and not of a loan merely, see Fletcher *v.* Manning, 13 Law J., N. S. 150; S. C. 12 Mee. & W. 571.

Mere production of a probate copy of a will, or even letters of administration, is not even *primâ facie* evidence of the decease of the supposed testator, or intestate; Moore *v.* De Bernalis, 1 Russ. 307; 10 Ves. 289; and, contrary to older case French *v.* French, Dick. 268. But in such a case the Court gave the party liberty and time to prove the death, in the proper way.

Where an instrument is shown to be false, the *onus* of supporting it lies upon the party claiming benefit under it; Watt *v.* Grove, 2 Sch. & L. 502.

To prove that by one instrument two legacies intended to be given, *onus* is on legatee; but by separate instruments, it lies on the heir to disprove it; Hooley *v.* Hatton, Dick. 462. But as to these and the like presumptions, and evidence to support and rebut them, *vide supra*, p. 294.

A bond was on the face of it a simple money bond, unless it could be impeached by evidence; held that the *onus* of proving it to be only an indemnity bond was upon the party impeaching it; Nicol *v.* Vaughan, 1 Clark & Fin. 49; S. C. 6 Bli. N. S. 104.

If a *feme covert* insists on the fact of undue influence having been exercised by her husband, it has been said, she must prove it; Field *v.* Sowle, 4 Russ. 112.

And in general as to the *onus probandi*, in cases of an alleged undue advantage having been taken, see Hunter *v.* Atkins, 1 Coop. temp. Br. 464. As to undue influence, see Casborn *v.* Barham, 2 Beav. 76. The purchaser of a reversion must prove that he gave a full price, see Hincksman *v.* Smith, 3 Russ. 433.

As to the *onus probandi*, in case of an alleged right, see Finch *v.* Besbridge, 2 Vern. 390; and now see stat. 2 & 3 Wm. 4, c. 71.

The *onus* of supporting the Master's report, against exceptions, lies on the party in whose favour it is made; Kilbee *v.* Sneyd, 2 Moll. 195. But on appeals generally, the *onus* on the appellant; Lloyd *v.* Trimleston, ibid. 81.]

Documents not properly stamped.

This would be the proper place for entering upon a subject of considerable length and importance, namely, the Stamping of Documents, which has been for nearly a century and a half a necessary preliminary to their being admitted as evidence. [But as a bill was before Parliament which would make essential alterations in the law on this subject, the author (Mr. Gresley) determined to do no more than briefly mention it, as he did.]

Provisions of Stamp Acts.

But it seems proper, in this edition, to observe further that, by the provisions of the several Stamp Acts, certain records, deeds, instruments, and writings, thereby subjected to certain stamp duties, before they can be pleaded or given in evidence, in any Court, or admitted, in any Court, to be good, useful, or available, in law or equity, must be marked or stamped.

Reference to Starkie on Evidence.

The consequences of these enactments will be found fully detailed, and (as Mr. Gresley observed) ably digested by Mr. Starkie, in the Digest of Proofs, annexed to his Treatise on Evidence. (*a*) And it seems sufficient therefore, here to refer to such few cases only, as have occurred in Courts of Equity, or very recently in Courts of Law, and seem to illustrate further the application of this general principle. (*b*)

(*a*) [Stark. on Ev., 3rd edit. Vol. 3, p. 1034, *et seq.* Stamp, and particularly p. 1056, n. (*s*), where the acts are all referred to. As to Stamps on Agreements, &c., see also Jarman's Byth., 3rd edit. by Sweet, Vol. 1, p. 715, *et seq.*, where this practically useful part of the subject is very fully treated, and the cases cited at some length.]

(*b*) [Where an instrument is sought to be given in evidence, merely to invalidate it,—either on the ground of fraud or forgery, it need not be stamped; otherwise when offered with a view to give any legal effect whatsoever to it,—either at law or in equity; Williams *v.* Gerry, 10 Mees. & W. 296. As to the latter point, see also Buxton *v.* Cornish, 1 Dowl. & L. 585; 13 Law J., N. S. (Exch.) 91, and 12 Mees. & W. 426; 8 Jur. 46.

An original letter was stamped after production, to make it receivable in evidence, in Ford *v.* Compton, 2 Bro. C. C. 32.

If the terms of a contract are reduced into writing, the paper must be stamped, in order to be readable in evidence, even collaterally; Hearne *v.* James, 2 Bro. C. C. 309. In one case in equity, where a bill was founded on letters not stamped, a decree was made; but directed not to be delivered out, till the letters were stamped, and produced to the registrar; Chervet *v.* Jones, 6 Mad. 267.

And in general, it may be said, if it came to the knowledge of the Court that an agreement is not stamped it is not competent to the parties to waive the objection; and no decree will be made until the instrument is produced to the registrar properly stamped; Owen *v.* Thomas, 3 M. & K. 353.

Where secondary evidence is admitted to prove the contents of a lost instrument, the Court will presume that the instrument was stamped; unless there is evidence showing that it was not stamped; Hart *v.* Hart, 1 Hare, 1, which case was decided by V. C. Sir James Knight Bruce, after an examination of the authorities. Whilst, on the other hand, secondary evidence of an instrument, which, from any circumstance, is presumed to have wanted a

Documents used at the hearing.

Here, perhaps, may conveniently be noticed two important decisions on points of practice, as to documents to be used at the hearing.

Document not proved, nor order obtained to prove it.

If a document has not been proved, nor any order obtained for proving it *vivâ voce* at the hearing, the Court will not allow it to be proved on the cause being heard, either on the equity reserved or the further directions. (*a*)

Effect of reading a document.

A plaintiff having read a document produced, under a general order, at the hearing, does not entitle the defendant to answer any statement, or enter into any explanation, (except as to the possession,) although, upon suggestion, the Court will direct any inquiry it may think fit. (*b*)]

stamp, is not admissible; Roe *v.* Clarke, 1 Yo. & C. 534.

The principal acts still regulating the law, as to stamps, are 55 Geo. 3, c. 184, and 3 Geo. 4, c. 117. And see Lord Eldon's observations in Huddleston *v.* Brisco, 11 Ves. 596.

Although ten years have elapsed, and several acts, as those 4 & 5 Vict. c. 40, 6 & 7 Vict. c. 72, 7 Vict. c. 1, and 7 & 8 Vict. c. 21, (as to agreements and letters or powers of attorney,) have been passed, each of them in some respects altering the Stamp Laws, it would seem the particular bill alluded to by Mr. Gresley, in the original text, has not been passed.]

(*a*) [Blundell *v.* Gladstone, 11 Sim. 489.]

(*b*) [Miller *v.* Gow, 1 Yo. & C. 56.]

PART THE THIRD. [292]

THE EVIDENCE USED BY THE COURT AT THE HEARING.

Subject viewed differently by the Court and the parties.

It should always be borne in mind that evidence is looked upon by the Court in a somewhat different light from that in which it is viewed by the parties. The suitor aims at presenting so much only as will tend to prove his own side of the question, and carefully excludes not only all that will tell against him, but even all that for his purpose is superfluous. But the Judge, particularly in Courts of Equity, endeavours to extract the genuine and perfect truth, regarding with impartial eyes the questions in litigation, while he protects the rights of all others whom those questions may affect, and vigilantly guards the general interests of the public at large. Therefore, having discussed the duty of the parties in collecting the first mass of evidence, and the rules of law by which the dross is refined away, we will now consider ourselves in the place of the Judge; and view the evidence with reference to its genuine value, and its utility in deciding the cause.

Extent of it.

In thus changing our position we find our view expand. There are many proofs of incontrovertible truth, or of positive law, which the Court keeps always within sight, and refers to for its own assistance; and there are other matters which it will, on the mere suggestion or mention of them, inspect and judge of for itself, or take up independently of the parties and investigate by its own authority. Besides which, there are shades of an infinite variety, in the degree of credit to be [293]

attached to each kind of proof, graduating from that which is merely *primâ facie* up to that which is conclusive. (*a*)

Classification.

It will therefore be convenient to consider the whole subject *de novo*, as it presents itself to the Court; enumerating the various forms in which are produced the proofs of that aggregate of law and of facts on which the final judgment must be founded. It is not easy to classify these forms; but we may place in one section matters of which the Court will take judicial cognizance whether immediately, *suo motu*, or not until its attention has been formally called to them; in another, those things which the Judge will inspect with his own eyes in aid of the evidence produced to prove them; and then proceed to the ordinary evidence by which facts are represented to the mind of the Court through the medium of witnesses. It will, however, be found that in this attempt at classification the subdivisions run a good deal into one another.

(*a*) [At the risk of seeming to place even too much stress upon the effect of the Act "for improving the Law of Evidence," stat. 6 & 7 Vict. c. 85, we venture, once more, to refer the reader to its preamble as set forth, *supra*, p. 326-7.

We venture, also, once more, to remind the reader of the strong, but just, observations of C. B. Gilbert, as to decisions involving the determination of the credit to be given to a witness. These we have cited above at p. 5, n. (*b*).

As to *primâ facie* evidence, *vide supra*, p. 187, n. (*e*), *et* p. 390, n. (*a*). And as to secondary evidence, *vide supra*, p. 247, n. (*a*) *et* n. (*b*).]

CHAPTER I.

WHERE THE COURT TAKES JUDICIAL COGNIZANCE.

SECTION I.

SUO MOTU.

Previous knowledge of the Judge.

Of the private and peculiar facts on which the cause depends, the Judge is (as in trials at law, the jury are,) (*a*) bound to discard all previous knowledge; but it is in the nature of things that many general subjects to which [counsel as] [294] an advocate calls attention should be of so universal a notoriety as to need no proof. To require evidence of every fact, as that Calais is beyond the jurisdiction of the Court, [or the like,] would be utterly and obviously absurd. (*b*)

Universal notoriety.

But we can scarcely hope to approach a definition of this vague expression, universal notoriety. It must depend upon many circumstances; in one case perhaps upon the progress of human knowledge in the fields of science, in another upon the extent of information on the state of foreign countries, and in all such instances upon the accident of their being little known or having been publicly communicated. In an application for an injunction to prevent the infringement of a patent, the question has sometimes

(*a*) Lord Ellenborough draws a nice distinction, in the trial of the Luddites, as to the notoriety of the outrages; "Every one of the jury must be aware of what had passed before their own eyes and at their own doors, but they were not to rely on that as a source of information on which they were to found their verdict; but only that it might make the proof more satisfactory to their minds." R. *v.* Sutton, 4 M. & S. 542.

(*b*) [So the Courts will take notice, that by the "Kingdom of Ireland" is meant that part of the United Kingdom of Great Britain and Ireland called Ireland; Whyte *v.* Prose, 4 P. & D. 199; and that the common law extends to Ireland, *in re* Nesbitt, 2 Dowl. & L. 529, 14 Law J., N. S. 30.]

turned upon a scientific discovery, as yet only imperfectly known to a few; but which is on the point of being matured and announced to the world, and will soon become familiar to the mind of every one. The evidence on which a discussion arose in the trial of Warren Hastings, respecting the treatment of women of rank by the Mahomedans, would probably in these days, and before the same tribunal, be superfluous, the fact being well known and indisputable. (*a*) Still more must the limits vary, (in reality, though perhaps not so apparently,) according to the extent of knowledge and previous habits of the Judge. One who had made chemistry his study, would not need the accumulated opinions of scientific chemists; one to whom a foreign language was familiar, would read a document without translations, or comments; one who had resided in India, would hear and speak of the customs there, as matters of course. (*b*) Other Judges might, with proper diffidence, require evidence on which they could rely: but after all it is obvious that there are many subjects on which, [were it not for the learning of the Judge,] any quantity of evidence would fail of supplying the defect. (*c*)

Experience or learning of the Judge.

[295]

Some classes of facts are dependent more peculiarly upon the memory, than upon the information, of the Judge; and when he is at fault, (which must needs frequently happen, for they are often beyond the ordinary power of memory) documents of reference are brought to his assistance. This is the case with

Documents of reference; as to

—dates,

(*a*) See 1 Phill. on Ev. 404.

(*b*) [Some Judges have been abroad, if only during a Vacation, some only in the country; some, therefore, will take notice of what others may prefer to have proof. A Court of law takes no judicial notice in what country a place is situated; Bunce *v.* Thompson, 2 Ad. & El. N. S. 789. It seems that in general a Court will notice whatever ought to be generally known, within the limits of its jurisdiction; Chitty *v.* Dendy, 3 Ad. & El. 319, S. C. 4 N. & M. 842;—custom of bankers, as in Barnett *v.* Brandas, 6 Man. & G. 630;—course of nature, as to rain, as in Fay *v.* Prentice, 14 Law J., N. S. 298, S. C. 9 Jur. 876. The Court of Queen's Bench takes judicial notice that the Master of the Rolls is a Judge of the Court of Chancery; *ex parte* Clarke, 2 Gale & D. 780, S. C. 2 Ad. & E., N. S. 619. But after all, *semble*, this and the like is matter of law, rather than of mere fact. It does not appear that, prior to the stat. 8 & 9 Vict. c. 113, the Courts took notice of who was Master of the Rolls, or of his signature.]

(*c*) The case of the Atty. Gen. *v.* Shore, furnishes an illustration of this; for there, a knowledge of the history of the dissenting bodies, of the ancient languages, and of theological polemics, were all of utility in forming the decision. [And so in the case of Dame Hewley's Charities, Att. Gen. *v.* Drummond, 1 Connor & L. 210.]

respect to dates; (*a*) for which the Court will require no other proof than applying to an almanac. (*b*) General history, the acts of our Government, and the laws of the land, fall under this description. Strictly speaking they do not perhaps belong to our present subject, but when the proofs of them are produced by the counsel and laid before the Court together with the other evidence, they are so nearly of the same nature as to be called by the same name and to be considered merely as another branch of Evidence. It will have been observed that these remarks apply principally to Courts of Equity, where the same individual decides upon law and fact, and where consequently, feeling on what point he is himself deficient, he knows exactly when to call for information. They are also applicable, though not so strongly, to certain tribunals in which not one Judge but several preside, as the Judicial Committee of the Privy Council and the House of Lords. But where twelve jurymen have to pronounce their verdict upon the facts, and yet it is for the Judge to point out what evidence is to be laid before them, he is without any certain guage or measure. Therefore some attempt has been made at fixing rules for his guidance;—a point the more necessary, because there are instances of a new trial being granted in consequence of evidence of this kind not having been laid before the jury. (*c*)

—history,
—politics,
—laws, &c.

[296]

The foregoing remarks are strongly exemplified by the subject of History, [as to Public facts.] If, (as it is not unfrequent in a pedigree case), a Prayer Book without a title page be produced to show a contemporaneous entry of a birth at a particular date, say *e. g.* 1760, the detection of Queen Charlotte's name in the prayer for the royal family would cause its immediate rejection; but if the date of the entry were ten years earlier, and the prayer for Frederick Prince of Wales omitted, the Court might,

Histories, as to facts of a public nature;

(*a*) See an instance, Page *v.* Faucet, Cro. Eliz. 227.

(*b*) So for the meaning of words to dictionaries. Such reference is not unfrequent in will cases; Sir L. Shadwell, V. C. of E., in one of his earliest judgments, produced Johnson's, to show the meaning of the word "effects," it is given "goods, moveables." Lexicographers and etymologists were referred to in the singular case of Clementi *v.* Golding, 2 Camp. 25, which turned upon the meaning of the word "book."

(*c*) Withers's case, cited 4 T. R. 446.

[As to evidence explanatory of documents, *vide supra*, p. 279, *et seq.*]

or might not, be a little at a loss. (*a*) In such cases, and in others more remote, or more obscure, the Judge must have regard to the nature of the fact, and the authority of the work to which he refers. In short he must combine somewhat of historical criticism with his judicial caution. Thus Speed's Chronicle was referred to, for the date of the death of Isabel the Queen Dowager of Edward II.; (*b*) and for some other point in an earlier case in the House of Lords; (*c*) and, by Judge Hale, even for the purpose of showing that the same Queen Isabel was unjustly deprived of her right to present to St. Katherine's Hospital. (*d*) Chronicles were admitted in the *case of the Lady Ivy and Neale* to discover the forgery of a deed, by mistake of the style of a King: for Philip did not assume the style of King of Spain for six months after the surrender of Charles V., when it was confirmed by the Estates. (*e*) These were public facts, although the proofs were the mere assertions of private individuals. But private affairs, though they may create a general interest, cannot be heard at all on the authority of a private historian, and receive no pecular authentication even from public documents. Camden's Britannia was not admitted to prove a custom at the salt pits of Droitwich; (*f*) even the preamble of the stat. 9 Anne, c. 16, would have furnished no evidence of the guilt of Guiscard. (*g*) But when a public matter is mentioned in a public document, there is a deference paid to it in our Courts, although in truth it is evidence of exactly the

but *secus* as to those of a private nature.

[297]

Recitals in statutes, &c.

(*a*) [The Prayer Book always affords another test, so far as the reign, viz., the prayer for the accession day, and the order in council, that the four forms of prayer and service made for, &c., &c., &c. But this will only fix the reign. Counsel in each case is able to suggest sufficient additional tests.]

(*b*) Lord Brounker *v.* Atkyns, Skin. 14.

(*c*) Lord Bridgwater's case, cited in Skin. 15.

(*d*) Atkyns *v.* Mountague, 1 Ventr. 149.

(*e*) *Arg.* 6 Skin. 623, *et vid.* Co. Lit. 7.

(*f*) Steyning *v.* The Burgesses of Droitwich, Skin. 623, 1 Salk. 282. When historians were adduced to show that king Alfred was the founder of University College at Oxford, Lord Raymond, C. J., "declared that such evidence was never admitted unless in proof of a point concerning the government;" Cockman *v.* Mather, 1 Barnard, 14. Sir William Dugdale's works, though of the highest historical authority, have been frequently rejected as evidence; his Monasticon in the Exch. in 1695, Skin. 624; his Baronage in Percie's case, *ib.*; his History of Warwickshire by the House of Lords in the Leigh Peerage case in 1829. [A county history was rejected on a question as to boundaries of a manor; Evans *v.* Getting, 6 C. & P. 586; and see also White *v.* Beard, 2 Curt. 492.]

(*g*) *Arg.* 4 M. & S. 536. [*Sed vide infra*, p. 399, n. (*a*).]

same kind as those of which we have just been speaking. Thus the preamble of a public statute is called a high authority for any general fact that it contains; (*a*) for instance, the stat. 27 H. 8, c. 26, was adduced as strong proof that in the words of a devise "the kingdom of England" included Wales; for it recites that Wales "justly and righteously is, and ever hath been, incorporated, annexed, united, and subject to, and under the imperial crown of this realm, as a very member and joint of the same." (*b*) But in reality, it is always necessary to examine, whether the truth may not have been distorted, for some political object of the day. (*c*) It should be observed that [some of] the great text-books with which the Court is familiar as authorities for law, are also admitted without difficulty as authorities for facts. Lord Coke, in his discursive style, introduces a great deal of history. In the last mentioned case his words are quoted, that "in the time of Henry VIII., by certain just laws made at the humble suit of the subjects of Wales, the principality and dominion of Wales was incorporated and united to the realm of England." (*d*)

Preamble of a statute.

Legal text books.

[298]

Acts of government, and our political relations with foreign powers are always expected to be well known and understood by the Judge, particularly the Lord Chancellor, as a Cabinet Minister. The Court is, however, at all times ready to hear any public document, or to seek for any authentic information, which may remove uncertainty with regard to such matters. The Vice Chancellor, (Sir L. Shadwell,) allowed a demurrer to a bill, which depended upon the validity of a contract, made with the government of Guatemala, before its separation from the mother country had been recognised by England. (*e*) And when another bill, to avoid a demurrer, alleged that that

Knowledge as to acts of government and political matters.

(*a*) "It is to be taken for truth, for it cannot be thought that a statute that is made by the authority of the whole realm, as well of the king, as of the lords spiritual and temporal, and of all the commons, will recite a thing against the truth;" Co. Litt. 19, *b.*; R. *v.* Sutton, 4 M. & S. 542.

(*b*) Okeden *v.* Clifden, 2 Russ. 312.

(*c*) As in the Statute for the dissolution of Monasteries, 31 H. 8, c. 13; which recites that "the abbotts and priors, &c. of their own free will and voluntary minds, — and without constraint,—surrendered to the King."

(*d*) 4 Inst. 240; Okeden *v.* Clifden, 2 Russ. 313.

[As to Ireland, *vide supra*, p. 395, n. (*b*).]

(*e*) Thompson *v.* Powles, 2 Sim. 194.

state had been treated as independent by our King, the Vice Chancellor, having deferred his judgment, said, "I have had communication with the Foreign Office, and I am authorized to state that, the Federal Republic of Central America has not been recognised as an independent Government, by the Government of this country." (*a*) The Courts "take notice" of our being or having been at war: (*b*) but for the dates at which hostilities commenced, or ceased, (*c*) or for the events, such as the terms of the capitulation of an island, (*d*) the Gazette is usually referred to, as affording precise evidence.

The Gazette.

[Indeed] "the Gazette is the authoritative mean of proving acts relating to the Sovereign and the State; otherwise the proof would run into endless niceties." (*e*) It has, therefore, been admitted in proof of an Order in Council prohibiting exports, (*f*) or enforcing quarantine; (*g*) of a proclamation for

[299]

suppressing outrages, and thence of the fact that outrages had prevailed; (*h*) and of the presentation of addresses to the King. (*i*) Statutes have made the Gazette in certain cases good evidence as to bankrupts, (*k*) but in general it is no proof of private matters, as of an appointment to a commission, unless as secondary evidence. (*l*) It may be mentioned here that of the Gazette, as well as of other public documents, such as the Statutes, or the articles of war, a copy purporting to be printed by the King's Printer is admitted without further proof. (*m*)

(*a*) Taylor *v.* Barclay, 2 Sim. 220. Thus in delivering a judgment, Lord Mansfield said that he had made inquiry at the Hawkers' and Pedlars' Office, to ascertain whether an alleged custom respecting lace really existed; Maxwell *v.* Mayre, 1 B. C. Rep. 364.

(*b*) Lord Eldon, in Dolder *v.* Lord Huntingfield, 11 Ves. 292. Foster's Crown Law, Disc. 1, c. 2, s. 12; Wells *v.* Williams, Ld. Raym. 283.

(*c*) General Picton's case, 30 Howell's St. Tr. 493.

(*d*) Dupays *v.* Shepperd, Holt, 226.

(*e*) Ashurst, J., in R. *v.* Holt, T. R. 444.

(*f*) Atty. Gen. *v.* Threakstone, 8 Pri. 89.

(*g*) Lord Kenyon, in R. *v.* Holt, T. R. 443.

(*h*) R. *v.* Sutton, 4 M. & S. 532.

(*i*) R. *v.* Holt, 5 T. R. 436.

(*k*) [The stat. 5 & 6 Vict. c. 122, s. 24, rendering the Gazette conclusive evidence of the bankruptcy, has been held not to apply to cases where the fiat issued before the act came into operation; Edwards *v.* Sherren, 3 Dowl. N. S. 338; S. C. 11 Mus. & W. 595.]

(*l*) R. *v.* Gardner, 2 Camp. 513. [Indeed, we sometimes see one Gazette correcting a prior one, as to the Christian name of a gentleman, appointed to a commission, or the like. A parish having been divided into several distinct parishes, by order of the King in council, under 58 Geo. 3, c. 45; held, that this could not be proved by the production of the Gazette, containing a copy of such order; Stark. Ev. 3rd Ed. Ap. 607.]

(*m*) Withers's case, cited 4 T. R. 442. [As to this, *vide supra*, p. 148.]

Ambassadors' communications.

The political relations of foreign states with one another, (unless the Court, as in the case above mentioned, prefer ascertaining the facts for itself by a communication with the foreign office,) may be best proved by the papers sent home officially, by our ambassadors. The commencement of the war between France and Spain, in 1793, was thus evidenced, in an insurance case, before Lord Ellenborough. (*a*)

Parliamentary journals.

The Journals of the Houses of Parliament (*b*) are sometimes used as evidence of public facts not inserted in the Gazette. The King's address and the answer of the House of Lords were thus proved, with the ulterior object of showing from them, that certain differences had existed, between George the Second and the King of Spain. (*c*)

Knowledge of the laws and practice.

A perfect knowledge of the laws of the land, and the practice of the Court, is an essential part of the judicial character. But as this is the language of theory, and the Judge, in reality, often requires to be informed, or at least to have his memory refreshed, it frequently becomes necessary to prove to him particular points of law. The means of proof consists of Acts of Parliament, (*d*) and Precedents, [Decisions of similar cases, (*e*)] and, for matters of practice, sometimes the statements of the officers.

Little need be said on these two subjects, occurring as they do in the familiar routine of constant experience.

[300]

Certificates as to practice.

The Masters and other officers who are not usually in Court, return, under their signature, a certificate of the question referred to them. The Registrar will either answer it at once, or take time to search his minute-books and registers; and be ready, when next called upon, to produce the result of his investigation: (*f*) or he will confer with the other Registrars; and then their combined opinion is generally given in the form of a

(*a*) Thelluson *v.* Gosling, 4 Esp. Rep. 266.

(*b*) [As to the proof of them, by copies purporting to be printed by the King's printer, *vide supra*, p. 148-9.]

(*c*) In Franklin's case, 9 St. Tr. 259.

(*d*) [As to which, *vide supra*, p. 148.]

(*e*) [In any of the now very numerous recognised reports; but in case of any doubt as to the facts, the Court refers to the book of the registrar, Ch. Com. App. p. 372, Q. 47, &c., cited below.]

(*f*) As in Waterton *v.* Croft, 5 Sim. 502.

Certificate furnished to counsel.

certificate. If the request be not unreasonable, they will furnish counsel with a certificate, to enable him to meet the difficulty, as soon as it is felt by the Court. A certificate that has once been returned, is available on any future occasion. (*a*)

Precedents.

With regard to Precedents, no reader of this work will need to be reminded that, nine times out of ten, points of law are

Reports of cases decided;

argued,—on the one side by applying to them cases already decided on similar questions,—and on the other by showing, in each, some distinction, that proves it not to be in point, or some incoherence, that invalidates its authority. The difference

in the House of Lords, or Courts below;

between precedents in the House of Lords and in the Courts below, is not in general sufficiently attended to: a Judge will overrule the decisions of a former Judge, but he will not run directly contrary to the higher tribunal. An instance, which illustrates this very natural and proper repugnance, has been given, in a former page, when we were discussing the production of the opinions of counsel. (*b*) Any one may easily see that it [may] sometimes lead to inconvenience and absurdity, but it is difficult to suggest a remedy. As for the rest, experience alone

the authority of such;

can teach the relative authority of each Judge, or accuracy of each reporter; (*c*) and observation alone can show whether the Judge before whom the cause is heard, is easily swayed by

[301]

authority, or is fond of breaking through its trammels. At

(*a*) Anon. 5 Sim. 497.

(*b*) *Vide supra*, p. 41.

(*c*) Judges sometimes express their opinions as to the respective value of particular reporters. The following references contain some of their *dicta*, and may be found useful. First, in *dispraise;* of Noy, Ventr. 81, 2 Keb. 652; of Coke, Sugd. on Powers, 25, Ed. 4th; of Croke, 2 Keb. 316; of Popham, 1 Keb. 676, 1 P. Wms. 17; of Freeman, Cowp. 16, yet see 3 Ves. 580; of Keble, 3 Wils. 330, Ridg. Ca. t. Hardw. 100, Lord Kenyon said, "We do not sit here to take our rules of evidence from Keble and Siderfin," 1 Bl. Rep. 366; of Modern Reports, Vol. 2, 1 Ld. Raym. 537; of Vol. 4, 2 Ld. Raym. 1071; of Vol 6, 1 Ves 11, Ridg. Ca. t. Hardw. 126; of Vol. 8, 1 Burr. 386, 3 Burr. 1326; of Vol. 11, Cowp. 16; of Vol. 12, Doug. 83; Rep. t. Finch, 3 Atk. 334, 1 Wils. 162; of Vernon, 1 Atk. 556, see 10 Mod. 530; of Salkeld, Lord Kenyon said "I have heard Mr. J. Foster say that he had all the law-books of authority, but he had not 3 Salkeld,—considering it no authority," MS.; of Bunbury, 5 Burr. 2658; of Fitzgibbon, 3 Atk. 610; of Barnardiston, 2 Burr. 1142, note, 2 B. & B. 386, (but C. B. Alexander used to praise him highly); of Sir W. Blackstone, Doug. 93, note of Dickens, Sugd. on Vend. 181; of Vol. 3 of Peere Williams, 2 M. & K. 757. Secondly, in *praise;* of Fitzherbert, Plowden, and Dyer, Pref. to 10 Co. Rep.; of Leonard, 3 Ch. Ca. 49; of Carthew, 2 T. R. 776, Willes, 182; of Saunders, Willes, 479; of Strange, Foster's Crown Law, 294; of Peere Williams, 3 Ves. 130, 4 Ves 462. [Further see Chitty's Eq. Index, *voce* Decisions, &c. Doubted, &c]

certain periods particular subjects have attracted the more careful attention of the Courts; perhaps, because some new statute has introduced an uncertainty in the law; or some treatise, or decision, has caused it to be more generally discussed; or perhaps merely because one of the most eminent Judges takes a peculiar interest in that branch of jurisprudence. A precedent [or as it is called technically "a case," decided] during such a period would, of course, carry a greater weight than one of an earlier date. The subject of the present treatise was in a very unsettled state until Lord Hardwicke applied his comprehensive mind to it; and his decisions may be almost said to form the basis of the law by which it is now regulated. Such being the fact, it will scarcely amount to a digression to notice the high testimony borne, by the late Lord Chancellor Eldon, to the merits of his great predecessor; "No man felt more highly,—no man admitted more highly,—the character of Lord Hardwicke, as a Judge in Equity, than he did. Few men had had a greater opportunity, than had been afforded to him, of arriving at a just estimation, of the great abilities of Lord Chancellor Hardwicke; for, early in his professional life, the late Lord Hardwicke, had placed in his hands, the manuscript notes of his father, the Lord Chancellor; and they fully proved the zeal, ability, and diligence, which he applied to, and with which he disposed of, the business of his Court. From these manuscripts it was evident that he took most copious notes, and made most elaborate minutes, in the course of the judicial proceedings that came before him. From them it was manifest, that his decisions were not delivered at the moment; they were not founded on a mere recollection of what had passed in Court,—no, his judgments were written in his own hand, and were read by him in Court." (*a*)

particular decisions on particular subjects;

when such carry greater weight.

As to evidence used in equity, cases decided by Ld. Hardwicke, C.

Eulogy of Ld. Hardwicke, C. by Ld. Eldon, C.

[302]

The great Text-Books may be placed under the same head with Precedents, for they are used in the same manner; and some of them, being written by our most learned Judges, are of higher authority than the *obiter dicta* of the same individuals

Text-books.

(*a*) Speech in the House of Lords, 29th April, 1836.

Common Law. from the Bench. The Common Law is, of course, more likely to be drawn pure from the ancient sources, and moreover they condense all the useful matter contained in the earlier precedents. Thus Sir Edward Coke's Commentary on Littleton is Year books. looked upon almost as a digest of the Year Books. (*a*)

Statute law. To proceed to the Statute Law; the Public Acts of Parliament may be quoted and called to the notice of the Court at any stage of the proceedings. The original Acts are kept in the Parliament Office; but "after all the Public-General Acts of the Session have received the Royal Assent, a transcript of the whole is certified by the Clerk of the Parliaments, and deposited in the Rolls Chapel: (*b*) on that occasion the Clerk of the Parliaments sends the Roll, or Rolls, containing such transcript, apparently in a complete state, engrossed on parchments, signed, and certified by him as Clerk of the Parliaments; and it is therefore arranged with the other Records; and thus becomes the Inrolment of the Statutes of that session of Parliament.—If any doubt arises as to the correctness of the Inrolment in Chancery, application is made to the Clerk of the Parliaments, and the original Act is thereupon produced, [303] and compared with the Inrolment, and an amendment, if requisite, is made in the Inrolment accordingly." (*c*) For the sake of convenience they are commonly read from the printed statute book, (*d*) and the reason assigned for this apparent want of strictness is that every person being supposed to know the law which he is bound to observe, that book is merely considered in the light of "hints to what is lodged in every Distinction of man's mind already." (*e*) The distinction of Public and Private,

(*a*) [And the several editions of that learned work by Hargrave and Butler, retaining the original form, and that of Thomas, altering and, for some purposes at least, improving upon it, furnish the very foundation stones of the knowledge of all our best lawyers. In these instances, at least, the editors have been worthy of commendation; and accordingly, the Judges have treated these editions of this work with marked respect: and a similar remark, it may be added, might be made, as to the learned treatises of Starkie and Phillipps, on the subject of Evidence used in Courts of Law.]

(*b*) [By an order of the Court of Chancery, 3 & 4 Phil. & M. 5th of October, 1556. The clerk of Parliament to certify acts of Parliament into the Court of Chancery every session; 1 Sand. Ord. 14.]

(*c*) Intr. to Statutes, printed by the Record Commission. [*Et vide infra*, p. 411.]

(*d*) [Purporting to be printed by the Queen's printer, and, by a late statute, such purporting is to be taken as sufficient evidence of the fact, *vide supra*, p. 148-9.]

(*e*) Gib. on Ev. 10. Errors may of

(which has been made in the printed collections as to all the statutes since Richard the Third's time, though many belonging to the latter class have been placed among the former,) is said to be that the former concern the kingdom in general, the latter only individuals or particular classes of men. (*a*) There is a vagueness in this distinction; in point of fact many statutes are partly public and partly private; (*b*) and a private statute may, through the operation of a subsequent act, be made a public one. (*c*) Several decisions as to various early acts are given and learnedly discussed in *Holland's case*, in Sir Edward Coke's reports, and the principles of the distinction may be gathered from thence. (*d*) The practical difference is that the public statutes are, as we have said, recognised at once, by the Court, as the Law of the land, and will be referred to by the Judge, if he is aware of their existence, even though they have not been spoken of by the counsel; while the private statutes must be regularly proved, (*e*) and as a preliminary to their evidencing the law on any particular point, it is necessary that they should have been mentioned in the pleadings. (*f*)

Public and Private Acts.

Some, partly public and partly private.

The practical difference.

[304]

A few words must be introduced here respecting the pleadings; for however ready the Courts may be to recognise the statute law, it sometimes happens that an act of Parliament will

Pleading an act of Parliament.

course be corrected by a reference to the original; R. v. Jefferies, 1 Str. 446. Ruffhead in his preface to the Statutes mentions an important decision, which seems to have been founded on a misprint in the editions formerly used; Pref. p. 27. Lord Ellenborough refused, with respect to an old statute, to admit the superior accuracy of the modern edition printed by the King's Printers: without proof that it had been examined with the Parliament roll: it was a case of an indictment setting out the title of the stat. 5 Eliz. c. 4, in the words of Ruffhead; R. v. Barnitt, 3 Camp. 344. [As to an act alleged to have been passed in 2 & 3 Ed. 6, but not found on the rolls, although a title of such an act on the calendar; see Doe d. Bacon v. Brydges, 7 Sc. N. R. 333, 13 Law J., N. S. 209.]

(*a*) Gilb. on Ev. 46.

(*b*) For example, the stat. 3 J. 1, c. 5, or the stat. 31 H. 8, c. 13; see Hob. 226.

(*c*) As the stat. 23 H. 6, c. 10; see Bull. N. P. 224.

(*d*) 4 Rep. 76; and see Doe v. Maningham, Plowd. 65.

(*e*) [In manner *vide supra*, p. 148-9.]

(*f*) "A particular" [*i. e.* a private] "act of Parliament is not taken notice of by the Court, without being pleaded; —for they are obliged by their oaths to judge all matters coming before them, *secundum leges et consuetudines Angliæ*, and therefore they can't be obliged *ex officio* to take notice of a particular law, because it is not *lex Angliæ* a law relating to the whole kingdom." Gilb. on Ev. 41. [Though copies of a private act printed by the Queen's printer, be made evidence, yet such act is not judicially noticed, but it must be put in evidence; Groswolde v. Kemp, 1 Car. & M. 635.]

not be listened to at the hearing, simply because it is incompatible with the line which the pleadings have taken. At Common Law, if an action be brought on a penal statute and the defendant plead the general issue, *sc.* that he is not guilty *contra formam statuti*, he may show any proviso contained in the Act itself as an exculpation, but he may not produce another statute which exempts him from the charge, because he ought to have pleaded it; "he should not have denied the declaration, but have showed the law which discharges him." (*a*) And where the statute is for the relief of persons who have incurred certain liabilities, then if the line of defence be to put the original liability in issue, the Court, (acting on the principle *quisquis renunciare potest juri pro se introducto*,) will not allow the statute to be cited at the hearing. (*b*) Thus if the obligor on a bond has pleaded *non est factum*, he cannot fall back upon the statute 13 Eliz. c. 8, and contend that it is usurious. (*c*) So in Equity, if the answer confess that a parol agreement was made, and merely dispute its terms or its legality on some special ground, the defendant will not be allowed afterwards to shelter himself under the Statute of Frauds; and it is the same with the Statute of Limitations. But if the statute be corroborative of the defence originally adopted, it is not precluded from being brought forward because it was not distinctly mentioned. (*d*) Even when a plea of a statute is taken as the line of defence in equity, Lord Redesdale says, "though the statute itself is usually set forth in the plea, yet that perhaps is unnecessary, and the substance of the plea consists in the averment of matter necessary to bring the case within the particular statute; and, therefore, if those matters appeared on the face of the bill itself it may be presumed a demurrer would hold, though this has been doubted." (*e*)

At Law.

Rule in Equity, as to the Statute of Frauds, and that of Limitations.

Statutes need not always be pleaded.

[305]

By the statute 41 Geo. 3, c. 90, s. 9, the statutes of England and of Great Britain printed and published by the King's printer, are received as conclusive evidence in any Court in

Statutes in Ireland.

(*a*) Gilb. on Ev. 11; 2 Rolle's Abr. 683

(*b*) Gilb. on Ev. 43.

(*c*) Whelpdale's case, 5 Co. Rep. 119.

(*d*) As to the Statute of Usury, 5 Com. Dig 645.

(*e*) Mitf. on Pl. 258.

Ireland; and the statutes of Ireland prior to the Union, so printed and published, are in like manner evidence in any Court in Britain. (*a*) Statutes of Ireland.

Questions have arisen respecting the dates of statutes; and it has been held that the Courts are bound to take notice of the commencement, session, and prorogation, of each Parliament. (*b*) With regard to the commencement there was formerly an especial reason; namely, that all acts which were not otherwise directed, took their date from the first day of the session: now, by virtue of the stat. 33 Geo. 3, c. 13, the Clerk of the Parliaments endorses, immediately after the title of each act, the day, month and year, when it received the royal assent; and such endorsement is taken to be a part of the act, and the date of its commencement where no other commencement is provided in the act itself. Dates of statutes.

(*a*) [As to private acts, the proof *vide supra*, p. 148-9.]

(*b*) R. *v.* Wilde, 1 Lev. 296; Birt *v.* Rothwell, 1 Ld. Raym. 353.

[306]

SECTION II.

NOT *Suo Motu.*

Modified cognizance.

THERE are other matters of which the Court will take a modified Judicial Cognizance; it will not point out their applicability nor call for them, but if they are once put in by either party it will investigate them, and will bring its own judicial knowledge to supply or assist their proof, and will then adopt them as its own evidence independently of the parties.

Acts of Parliament declared public.

Such are that class of Local and Personal Acts of Parliament which contain the clause "That this Act shall be deemed and taken to be a Public Act, and shall be judicially taken notice of as such by all Judges, Justices, and others, without being specially pleaded." It is inserted in Road Acts, Canal Acts, [Railway Acts,] all by which felonies are created, or by which penalties are inflicted or tolls imposed; these being all, to a certain degree, of a public nature. This clause does not make it the duty of the Judge to be aware of the act, unless it be laid before him; neither on the other hand does the omission of it prevent a statute, of a general nature, which has not been placed among the public statutes, from being judicially recognised. (*a*)

[Such are the Journals of either House of Parliament, and Royal Proclamations. (*b*)]

Records.

Such also are Records, which prove themselves, and of which the correctness is incontrovertible, even to the letter. (*c*) The

(*a*) See 1 Stark. on Ev. 196; *qu.* as to the Statute of the College of Physicians, Gilb. on Ev. 13. As to private acts, *vide supra*, p. 148.

[That such are proveable by a copy printed by the King's printer, see Beaumont *v.* Mountain, 4 M. & Sc. 177. And now as to all private, local, and personal acts of Parliament not being public acts, by a copy purporting to be such; by s. 3, of stat. 8 & 9 Vict. c. 113, *vide supra*, pp. 148-9.]

(*b*) [Proveable by copies purporting to be printed by the King's printer; by s. 3, of stat. 8 & 9 Vict. c. 113: *vide supra*, pp. 148-9.]

(*c*) "All matters of Record, in respect of their highness, are presumed in law to carry in themselves absolute truth. And therefore none can say that the King's Charter was made or delivered at another time than when it bears date; no more than a man may say that a recognisance, or statute-

extent to which the privilege of being considered records is carried is not accurately definable. (*a*) Mr. Cooper speaks of [307] a bill having been prepared to give to certain authentic documents written and printed, the validity and force of original Records. He gives the subjoined extract, (*b*) remarking that the subject is one, the consideration of which must, for many reasons, be resumed at no very distant period.

merchant, or staple, was acknowledged, or any writ purchased, at another time than when it bears date. For to aver that it was antedated, or that it was delivered or acknowledged after the date, tends to the discredit of the Great Seal, or of Justice, or of the officer of Record who recorded the Recognisance, or the statute-merchant, and the like;" Ludford *v.* Gretton, Plowd. 491.

(*a*) *Vide supra*, p. 147, &c.

(*b*) Account of the Records, Vol. 1, p. 445. "And be it further enacted, that it shall and may be lawful to and for the said Commissioners, or any three, or more of them as aforesaid, to order and direct that authentic copies of such Public Records, or Muniments, as they shall think expedient, shall be made and deposited in the British Museum, or in such other public repository as they shall think fit; such copies to be certified as true and authentic by a Sub-commissioner appointed by the said Commissioners as aforesaid, who, in his certificate, shall state that such copies have been thrice compared, examined and collated by him with the original Record, which certificate shall be countersigned by the said Commissioners, or any three, or more of them. And that all such copies so deposited and certified, and countersigned as aforesaid, shall be of the same validity, force and effect as the original Record, and be adjudged, deemed, and taken as an original Record, to all intents and purposes whatsoever; and that all exemplifications, constats, or copies of such copies so certified and deposited, shall be received in evidence in the same manner as exemplifications, constats, or copies of the original Record.

"And be it further enacted, that all copies of Public Records certified to be true copies by the keeper, or other officer having the custody, of such Public Records, or his known deputy, or by any Sub-commissioner appointed in manner aforesaid, shall be received as sufficient evidence without further proof in all Courts of Law, or Equity, and in all proceedings before either House of Parliament, or any Committee of either House, or before his Majesty's most Honourable Privy Council.

"And be it further enacted, that all and every the several copies of Records and Muniments included in the books named in the Schedule (A) hereto annexed, and heretofore printed by his Majesty's printer, under the direction of the Commissioners, or which shall be included in any books to be printed hereafter by his Majesty's printer, by the direction of the said Commissioners, or any three, or more, of them, shall also be received as evidence, without farther proof, in all Courts of Law or Equity, and in all proceedings of either House of Parliament, or any Committee of either House, or before his Majesty's most Honourable Privy Council."

He observes that "the Domesday published by the House of Lords ought perhaps to be added to the list."

(A) The Statutes of the Realm, Vols. 1, 2, 3, 4, 5, 6, 7, 8, 9.
The Parliamentary Writs, and Writ of Military Summons, Vols. 1, 2.
The Acts of the Parliament of Scotland, Vols. 1 to 11.
Registrum Magni Sigilli.
Placita de quo Warranto temporibus Edw. I, II., III.
Rotuli Hundredorum temp. Hen. III. & Edw. I., Vols. 1, 2.
Testa de Nevill, sive Liber Feodorum.
Taxatio Ecclesiastica Angliæ et Walliæ auctoritate Nicolai 4.
Rotuli Scotiæ, Vols. 1, 2
Valor Ecclesiasticus temp. Hen. VIII., Vols. 1, 2, 3, 4, 5.
Nonarum Inquisitiones
Libri Censualis vocati Domesday Book Additamenta."

Copies of Records.

[By s. 13 of the stat. 1 & 2 Vict. c. 94, (An Act for Keeping safely the Public Records) it was enacted, "that every Copy of a Record in the custody of the Master of the Rolls, certified as" (in the Act provided by ss. 11 & 12) "and purporting to be sealed or stamped with the seal of the Record Office, shall be received as evidence in all Courts of Justice, and before all legal tribunals, and before either House of Parliament, or any committee of either House, without any further or other proof thereof, in every case in which the Original Record could have been received there as evidence." (*a*)]

[308]

Exemplifications from other Courts.

It has been mentioned that for the proof of Records in other Courts, Exemplifications sent from certain of the Courts, are received on the mere inspection of their seals. (*b*) These instruments are said to be "of better credit than any sworn copy, for the Courts of Justice that put their seals to the copy are supposed more capable to examine, and more exact and critical in their examinations, than any other person is, or can be." (*c*) They have the advantage of being evidence even though the record itself be lost. (*d*)

Under the Great Seal.

Exemplifications attested by the Great Seal are in frequent use: (*e*) they are of two kinds,—those to which the Great Seal

(*a*) [For brevity sake, the rest of this important Act (being unessential) is here omitted; but, on the subject of records generally, it deserves a thorough perusal.]

(*b*) *Vide supra*, p. 153.

(*c*) Gilb. on Ev. 14 [An Order of 16 Jac. 1, 5th June, 1618, directs, that a *subpœnâ duces tecum* be awarded against Sir R. Egerton, Knt., to bring in certain letters patent, to be perused, conferred with the inrowlment, and an error, committed by the writer of the inrowlment, in putting therein the word Revington instead of the word Levington, to be corrected, by the Master of the Rolls. Sand. Ord. 107. *Note.*—The deed in question was a grant of the rectory of Levington, by Queen Elizabeth.

A similar Order of 11 Car. 1, 1635, as to a grant of lands, &c., in "Lanc." by mistake put in "Kanc," escheated to his Majesty, by death of John Calverley, Esq. without heir, and granted to Sir Kenelm Digby, Knt. See Sand. Ord. 75.

An Order of 16 Jac. 1, 1618-19, as to exemplifications, *vide post*, p. 415, n. (*d*).

An Order of 36 Car. 2, 7th May, 1684, as to an exemplification of a grant suspected to be forged, and the grounds of suspicion, and course adopted, &c. See Sand. Ord. 359.]

(*d*) Olive *v.* Gwin, Hardr. 120; where the admission of the Mayor of Bristol's seal after the record had been destroyed is adduced. Lord Hale alluded to it, in Green *v.* Proude, 1 Mod. 117, and admitted an exemplification of a recovery in the Marquess of Winchester's ancient demesne Court, the Court rolls having been burnt in the time of the wars.

(*e*) [Upon a claim to a Scotch peerage, in the absence of a patent of creation, where it appeared from the records of Parliament, that the ancestor had sat there; held, that an instrument, under the Great Seal of Scotland, produced from the repositories of the heir of entail of the family property, was admissible, as evidence of the creation

is primarily their proper seal,—and those which have come in contact with the Great Seal, by having been removed from other Courts into the Court of Chancery, by a writ of *certiorari*.

Primarily; —as copies of Statutes;

Of the former kind are copies of the Public General Statutes, of which a transcript, (as we have seen (*a*)) is regularly enrolled in Chancery, at the end of each session, and deposited in the Rolls Chapel. This is a record of Chancery, and Exemplifications are made from it for the purpose of sending particular statutes "either to Sheriffs of counties and cities in England, or to the Chancellor or Chief Justice of Ireland, or to the other Courts or places, for the safe custody and for the proclaiming or confirming of the Statute.—They are first made out in due form by the proper officer, and then examined with the Record, by two Masters in Chancery, who not only subscribe a certificate on the exemplification, of their having examined it with the Record, but also sign a certificate to that effect, addressed to the Lord Chancellor, on a paper called the Docket, which is left with him before the exemplification is allowed to pass the Great Seal." (*b*)

[309]

how such are made.

Proceedings in other Suits in Chancery;

Proceedings in suits, which have been regularly instituted in the Court of Chancery, may be exemplified, under the Great Seal, and sent out to other Courts, or used in other causes; but in the Court itself, those which belong to the same cause are proved by Office Copies. (*c*)

those in same suit.

Secondarily; brought from other Courts, by *certiorari*.

The Court of Chancery being the centre from whence the authority in all legal proceedings was derived, a power has always been exercised by it of demanding, by writ of *certiorari*, the records of other Courts, or a certified copy, which is called

of such a peerage, with limitations in tail male, as therein stated; Huntly Peerage case, 4 Cl. & Fin. 349.

It may be as well to observe that stat. 8 & 9 Vict. c. 113, (cited above, p. 148-9) does not extend to Scotland]

(*a*) *Vide supra*, p. 404.

(*b*) Introd. to Stat. printed by the Record Commission. [See an Order of 26 Eliz., 25th Jan. 1584-5, as to the "examinacion of every *constat*, *vidimus*, or *inspeximus*, upon any wryting or evidences, or any manner of exemplification, where yt ys necessary to have examinacions of any the Masters in Chancery;" Sand. Ord. 58.

And see stat. 1 & 2 Vict. c. 94, *supra*, p. 410.]

(*c*) [Of which exemplifications and office copies, *vide supra*, p. 152-3.]

the *tenor* of them. (*a*) It usually requires the latter. When returned, they are either used by the Court of Chancery itself, or authenticated, by the Great Seal, and then sent out, by a *mittimus*, to any Court that has need of them. (*b*) "Where *nul tiel record* is pleaded to the record of a superior Court, or
[310] Court of concurrent jurisdiction, there is no way to have it but by *certiorari* and *mittimus* out of Chancery; for one Court is not bounded by the other in point of jurisdiction, and in their judicial capacities they cannot command each other; but the Chancery, which is the centre of all the Courts, may by its original constitution, send for the records of any of them, and from thence the subjects may receive copies, or exemplifications under the Great Seal." (*c*)

Records of Courts other than that of Chancery,

—under the Great Seal;

—the Seals of other Courts.

Thus it will be seen that the records of any Court, except the Court of Chancery, may be exemplified in two ways, either by removing the cause by *certiorari*, and then procuring an exemplification under the Great Seal, or by procuring one under the seal of the Court to which the cause belongs. (*d*) By the first process the record of any Court becomes evidence on the mere inspection of its exemplification. But when the second is used, this privilege is said to extend only to the King's Courts, and such as have been established by act of Parliament: to the former because they have their sanction in that immemorial usage which is the foundation of the common law, and their seals are equally entitled to the supposal of

Such Seals

(*a*) The Court of King's Bench commonly exercises the same power; Butcher and Oldworth's case, Cro. Eliz. 821; Gwilliam *v.* Hardy, 1 Ld. Raym. 216; and will not send for a record by a less formal process, Hewson *v.* Brown, 2 Burr. 1034. "Where the superior Court does not send for the record of an inferior one to see whether they keep within the limits of their jurisdiction, but merely on *nul tiel record*, to know whether there be such a record or not, it is sufficient to certify the *tenor* of the record; and in Chancery they never certify anything more, for that Court does not send for the record of the inferior one to bound the jurisdiction, but to send it to other Courts by *mittimus*;" Tidd. 484, citing Gilb. Exec. 143 and 145. This must be taken with exceptions; for the Court of Chancery will consider the object for which the exemplification is wanted, and will sometimes demand the record itself; Woodcraft *v.* Kynaston, 2 Atk. 317.

(*b*) Gilb. on Ev. 15.

(*c*) Tidd, 484, citing Gilb. Exec. 145, 153, 169.

(*d*) [When a document purporting to be an exemplification of a commission, *temp.* Eliz, was produced from the proper custody, but the seal was gone from the usual slip of parchment annexed; held, at nisi prius, the Court would presume it a complete exemplification; Beverley *v.* Craven, 2 Mood. & R. 140.

Further as to seals of Courts, &c., *vide supra*, p. 154-5.]

being known to every body, as any other custom, or law, whatsoever; to the latter because the act of Parliament is of the same notoriety with the common law. (*a*) Thus it has been held that the seal of the Court of Exchequer, (*b*) that of the county palatine of Chester, (*c*) and all the seals of the Great Sessions in Wales prove themselves. (*d*) The Seal of the Court of Review, established by the stat. 1 & 2 Wm. 4, c. 56, s. 28, would seem to have the same claim to authority; but the succeeding section throws some doubt upon it, by enacting that certain documents, "purporting to be under that seal," shall be received in evidence. (*e*) There are however other seals which do not fall under either of the above descriptions, but are recognised when they appear before a Court; this is the case with the King's Privy Seal, (*f*) and also, in consequence perhaps of a courtesy in ancient times, with that of the City of London. (*g*) [By stat. 8 & 9 Vict. c. 113, s. 2, it is enacted, "That all Courts, Judges, Justices, Masters in Chancery, Masters of Courts, Commissioners judicially acting, and other judicial officers, shall henceforth take *judicial* notice, of the signature of any of the Equity or Common Law Judges, of the Superior Courts at Westminster, provided such signature be attached, or appended, to any decree, order, certificate, or other judicial or official document." (*h*)]

which prove themselves.

[311]

Stat. 8 & 9 Vict. c. 113, s. 2, Courts, &c. take judicial notice of the signature of any Equity or Common Law Judges, &c.

(*a*) Gilb. on Ev. 19, 20. See the Stat. 34, 35 Hen. 8, c. 26.

(*b*) Tooker *v.* Duke of Beaufort, Say. 297.

(*c*) Denby's case, (Hil. 7 Eliz.) Dyer, 236, a; as cited by Witherington, C. R., 2 Sid. 146.

(*d*) Olive *v.* Gwin, Hardr. 118, 2 Sid. 145. With regard to the enrolment of fines and recoveries, the stat. 27 Eliz. c. 9, s. 8, enacts, "That the exemplification of any enrolment of any fine or recovery, or of any part thereof, within any of the twelve shires of Wales or the town and county of Haverfordwest, under the judicial seal of the said shire, town, or county, where such fine or recovery was levied, had, or passed, and the exemplification of any such enrolment of any fine or recovery, or of any part thereof within any of the said counties Palatine, under the seal of that county palatine where such fine and recovery was levied had or passed, shall be of as good force and validity in the law, to all intents, respects, and purposes, for such part and so much of any of them as shall be so exemplified, as the very original record itself, being extant and remaining, were or ought by law to be."

(*e*) [When an Act of Parliament constitutes a Court with a seal, it is not necessary to prove the seal; but the Court will take judicial notice of it, the seal itself being the instrument of proof; Doe *v.* Edwards, 1 P. & D. 408: and see stat. 1 & 2 Vict. c. 94, ss. 11, 12, & 13, as to seal of Record Office, to be applied to authenticate copies, which, if purporting to be so sealed, are to be evidence. *Et vide supra*, p. 410.]

(*f*) 2 Sid. 146.

(*g*) Kempton *v.* Cross, cited in 1 Stark. on Ev. 190.

(*h*) [The other sections of this Act, *vide supra*, p. 148-9, *et* p. 157-8, as to seals, stamps, and signatures.]

The Seal of the Ecclesiastical Courts.

In proof of a will of personalty, or title to administration, the Seal of the Ecclesiastical Court is received without testimony. (*a*) The primary evidence, that administration has been granted to an executor, is the orignal entry in the Probate-act book; the ordinary evidence is the probate, which is in form a copy of the will, with a certificate, under the seal of the Court, (*b*) that probate has been granted to the executor; but in point of fact it is only a copy of the original minutes of the Court, drawn up in a more formal manner. (*c*) It is however looked upon as an original act of the Court. (*d*) If it be lost, a second probate is not given, but an exemplification is made out. (*e*) Exemplifications in these Courts do not exactly correspond with the form of exemplifications in other Courts; "it is the custom in the Prerogative Court, in exemplifications of general administrations, to set out the letters of administration *in hæc verba*; but in case of special administrations, as those with the will annexed, they recite the entries in their books and set out the will *verbatim*." (*f*) Lord Hardwicke said, in this case, that the granting administration might be proved, "by the commission itself, (which could only be denied by denying the seal,) or by a copy of the act of Court, or by an exemplification thereof." (*g*)

Probate copy of a Will.

Letters of Administration.

[312]

Proof of Administration.

(*a*) Woodmass *v.* Mason, 1 Esp. Rep. 53. [But grant of administration by the Ecclesiastical Court, is not conclusive evidence, in Chancery, as to who are the next of kin; Bans *v.* Jackson, 1 Yo. & Co. 585: nor proof of death of intestate; Clayton *v.* Gresham, 10 Ves. 288: nor is probate, &c., of death of testator, &c. *vide sup.* p. 390, n. (*a*).]

(*b*) [An exemplification, in fact. But the book being the best evidence when it is produced, non-production of the probate copy need not be accounted for; Cox *v.* Allingham, 1 Jac. 514. Indeed, obviously, only the persons having the probate copy can avoid the necessity for the production of the book, or at least another exemplification.]

(*c*) Chichester *v.* Philips, T Raym. 405; Marriott *v.* Marriott, 1 Str. 671; Kempton *v.* Cross, Ca. t. Hard. 108.

(*d*) Sir T. Plumer in Cox *v* Allingham, Jac. 514; Lord Ellenborough in Elden *v.* Keddell, 8 East, 187.

(*e*) Holt, C. J., in R. *v.* Haynes, Skin. 584; Hoe *v.* Nelthorpe, 3 Salk. 154. [*Et vide supra*, n. (*b*).]

(*f*) Shepherd *v.* Shorthouse, 1 Str. 412.

(*g*) Kempton *v.* Cross, Ca. t. Hard. 108. In the Court of Arches they set out *verbatim* whatever is exemplified, *ibid.* [Where by the practice of the Ecclesiastical Court no book was kept, but a memorandum only endorsed, or entered, at the foot of the original will, by the officer of the Court; held, that the production of the will, with such memorandum, was sufficient evidence of the title of the executor; also, that an exemplification of several letters of administration, relating to the same estate, on one parchment, with one *3l.* stamp, was sufficient; Doe *v.* Gunning, 2 Nev. & P. 260. Where original will lost, and from the exemplification thereof, under seal of the Prerogative Court, reason to suspect its validity, as to disposition of realty, such exemplification not received in evidence, but party left to his remedy at law; Arthur *v.* Arthur, 3 Bro. P. C. 568. *Et vide sup.* p. 178, *et seq.*]

H. M. Letters Patent.

The King's Letters Patent may be enrolled in Courts of Record and exemplified; (*a*) and, by the statutes 3 & 4 Ed. 6, c. 4, and 13 Eliz. c. 6, an exemplification, or *constat*, as it is called, under the Great Seal, of any letters patent made since Feb. 4, *anno* 27 H. 8, or after to be made, is sufficient to be pleaded and showed forth in Court, as well against the King as any other person, by the patentees themselves, or any other person claiming under them; and this extends not only to lands, but to every other thing whatsoever. (*b*) They are said to be the highest sort of records, as being the acts of the King himself; but still "the letters patent of another Court the Court doth not take notice of unless they be offered, for since they are none of the records that are directory to this Court of Justice, it is not the office of the Court to take notice of them, and therefore it is the duty of the parties to offer them as they do all other allegations." (*c*)

Exemplification or *constat*.

As to such containing the whole record.

It was said by the Judges of the Common Pleas "that no exemplification ought to be of any part of letters patent, or of any other record, or of the enrolment thereof, but the whole record, or the enrolment thereof, ought to be exemplified, so that the whole truth may appear;" (*d*) but this is not to be taken quite literally. (*e*)

Effects, in evidence, of Letters Patent.

The following cases show some of the effects of letters patent in evidence. Where they contained a recital that a certain office had been before granted to J. S., that he had surrendered it, and that in consideration of such surrender the King had granted it to J. D., these letters patent are not sufficient evidence against J. S., but the former grant and the

[313]

(*a*) [By an Order of 8 Car. 1, 1632, Letters Patent under the Great Seal of Scotland, of public concernment, ordered to be inrolled; Sand. Ord. 167.]

(*b*) Co. Litt. 225, *b.*; and see Page's case, 5 Co. Rep. 53.

(*c*) Gilb. on Ev. 93.

(*d*) Read *v.* Hide, reported in Co. 3 Inst. 173. [And so we see by an Order of 16 Jac. 1, 1618-9, No. 100, "No exemplification shall be made of (*inter alia,*) letters patent, with omission of the general words; nor of records made voyd or cancelled; nor of the decrees of this Court not inrolled; nor of depositions by parcel [or fractions omitting the rest]; nor of depositions in Court to which the hand of the examiner is not subscribed; nor of records of the Court not being inrolled or filed; nor of records of any other Court before the same be duly certified to this Court, and orderly filed here; nor of any records upon the sight and examination of any copy or paper, but upon sight, and examination of the original."—1 Sand Ord. 122.]

(*e*) See Bull. N. P. 227; and *supra*, p. 160.

[Further see stat. 1 & 2 Vict. c. 94.]

Recitals in such.

surrender must be produced. (*a*) But where they recited a surrender of a lease, and re-granted the land to the same lessee, they were thought then to be sufficient evidence of the surrender; though it was doubted. (*b*) If the plaintiff's patent recite a former grant and a surrender, though it was doubted, the defendant cannot take the former grant to be proved, and the surrender to need further proof, but must admit both, if either; he may, however, admit neither, but produce the former grant, and then the plaintiff must bring further proof of the surrender. (*c*) Where the grant of an office was that it should commence after the determination of a former then subsisting grant, this mention made it necessary to produce the former grant, to show at what period it had actually expired. (*d*)

Deeds enrolled.

In former times deeds used to be enrolled in Courts of Record for safe custody. (*e*) But the enrolments were not records, and when an exemplification of one under the Great Seal was once produced as evidence, the Judges of the Common Pleas resolved that "seals of Courts of record ought not to exemplify any thing but that which is of record." (*f*) It was also necessary that it should be "offered to the Court in pleading, even though the deed were enrolled in the same Court, in which the cause was depending, for it was no record,

(*a*) Meade *v.* Lenthall, 2 Rolle's Abr. 678.

(*b*) 2 Rolle's Abr. 780.

(*c*) Montague Lord, *v.* Preston Lord, 2 Ventr. 170.

(*d*) Cragg *v.* Norfolk, 2 Lev. 108. [An *inspeximus* of a grant by an archbishop, contained in a grant of confirmation by a subsequent archbishop, enrolled, and produced from among the records of the Rolls' Office, held good secondary evidence of the grant; Att. Gen. *v.* Cashel, Corp. of, 2 Con. & Law. 1.]

(*e*) Taylor *v.* Jones, 1 Salk. 389. [And as to a deed injured whilst in Court, see 2 Inst. 676; Gilb. Ev. 111, *et vide infra*. As to the enrolment of recognizances, see an Order of 26 Car. 2, 22nd July, 1674, Sand. Ord. 345.

An Order made 2 Jac. 1, 12th June, 1604, runs thus: "Forasmuch as this Courte was this present daie informed, by Mr. Attorney General, on his Majesty's behalf, that there are two indentures remayninge in the office of Sir Henry Ffanshawe, Knight, which were acknowledged before a Master of this Courte. And an indorsement is made uppon them, that they are inrowled in the Chancery; and yett they are not there inrowled. By which indentures, &c. the one of the said indentures being dated, &c. the other, &c. And because it is alleged that the inrowlinge of the said deedes cannot be hurtful to any subject but Sir T C., who doth assent that the same shall be inrowled. IT IS THEREFORE ORDERED, that the said two indentures shall be now forthwith inrowled" Sand. Ord. 81.]

(*f*) Read *v.* Hide, reported in Co. 3 Inst. 173. [But now see stat. 1 & 2 Vict. c. 94, (*sup.* p. 410,) and s. 20, interpreting the word "Record" in that act.]

but a deed recorded." (*a*) The advantage of it in evidence is, that it may be produced, if the original deed is not forthcoming; and that it is binding on the party, who acknowledged it, at the time of its being enrolled, and all claiming under him. (*b*)

Instruments enrolled.

Where instruments are enrolled under Acts of Parliament, the enrolments are then looked upon as records; (*c*) they are not traversable, in material points, and have often been allowed to prove themselves.

"It has been said that a deed of bargain and sale enrolled, (*d*) [314] may be given in evidence without proving the execution of it; because the deed, by law, does need enrolment, and therefore the enrolment shall be evidence of the lawful execution: but that when a deed needs no enrolment, there, though such deed be enrolled, the execution of it must be proved; because, since the officer is not intrusted by the law to enrol such deed, the enrolment will be no evidence of the execution.—However, the law may well be doubted, notwithstanding that deeds of bargain and sale enrolled have frequently, in trials at *nisi prius*, been given in evidence without being proved. In support of which practice the case of *Smartle* v. *Williams*, in Salk. 280, is much relied on; but that case is wrongly reported, for it appears, by 3 Lev. 387, that the acknowledgment was by the bargainor, and so it is stated in Salk. MS.; besides, it appears from both the books, that it was only a term that passed, and consequently it was no enrolment within th statute." (*e*) The opinion of Mr. J. Buller would probably be followed in preference to the practice, as he has expressed it both in the above passage, and also in the following; "If divers persons seal a deed and one of them acknowledge it, it may be enrolled, and may ever after be given in evidence as a deed enrolled;" but it would be of very mischievous consequence to say, therefore, that a deed enrolled upon the acknowledg-

(*a*) Gilb. on Ev. 92.

(*b*) Smartle v. Williams, 3 Lev. 388; Salk. 280; Holcroft Lady, v. Smith, 2 Freem. 259, 260. [And see Combes v. Spencer, 2 Vern. 471, and ibid. 591. A copy of such a deed read in evidence.]

(*c*) R. v. Hopper, 3 Pri. 495, 507. [As to what is a sufficient proof of enrolment of a deed, under the stat. 9 Geo. 2, c. 36, see Doe d. Williams v. Lloyd, 1 Sc. N. S. 505.]

(*d*) Under the stat. 27 Hen. 8, c. 16.

(*e*) Bull. N. P. 255.

ment of a bare trustee, might be given in evidence against the real owner of the land, without proving it executed by him. However, that has been the general opinion, and it seems fortified in some degree by 10 Anne, c. 18, which enacts, s. 3, that where any "indenture of bargain and sale enrolled shall be pleaded with a *profert in curiâ*, or offer to produce the same, the person or persons so pleading shall and may produce and show forth,—to answer such *profert*,—a copy of the enrolment of such bargain and sale; and such copy examined with the enrolment, and signed by the proper officer, having
[315] the custody of such enrolment, and proved upon oath to be a true copy, so examined, and signed, shall be of the same force and effect, to all intents and constructions of law, as the said indentures of bargain and sale were and should be of, if the same were in such case produced and shown forth." On the other hand, it seems absurd to say that a release which has been enrolled upon the acknowledgment of the releasor, should not be admitted in evidence, against him, without being proved to be executed, because such release does not need enrolment; and in fact such deeds have often been admitted; and that was the case of *Smartle* v. *Williams*; the deed did not need enrolment, yet being enrolled on the acknowledgment of the bargainor, it was read against him without being proved." (*a*) It is, however, in Salkeld, said to be the practice, that if a man lives abroad, and would pass lands here in England, they join a mere nominal party with him in the deed, who acknowledges it, and it binds. (*b*)

Date. The Statute of Enrolments does not require the date to be recorded, but as it has been the practice to insert the date, it is taken as a part, and an essential part, of the record. (*c*) The proper date is the day on which the deed is brought

(*a*) Bull. N. P. 256.

(*b*) Taylor v. Jones, Salk. 389. See 1 Stark. on Ev. 357. And see Hobhouse v. Hamilton, 1 Sch. & Lef. 208. [By stat. 3 & 4 Wm. 4, c. 74, (abolishing fines and recoveries,) s. 73,—any rule or practice requiring deeds to be acknowledged before enrolment shall not apply to any deed by that act required to be enrolled; s. 79, provides, however, as to deeds to be acknowledged by married women; and s. 88, provides what is to be evidence of such acknowledgment.]

(*c*) Graham, C. B., in R. v. Hopper, 3 Pri. 510; where the date was held conclusive, though written on an erasure. [But as to the date of a deed, *vide supra*, p. 288, *et* n. (*g*)].

o the office, even though it be after the office hours. (*a*) The endorsement, by the proper officer, on the back of the deed of bargain and sale, has always been received as evidence of its enrolment. (*b*)

Enrolment how proved.

But the memorials of the register of conveyances in the register-counties are clearly not primary evidence of the contents of the deeds. (*c*) The Court will, however, receive them as evidence of the time of registration, &c., as it receives various other documents created by force of statutes to prove circumstances relating to the purposes for which those statutes were passed. Thus the registers of a ship were not allowed to charge the person named in them as owner, in an action for the value of stores; Le Blanc, J., saying, "These registers were not produced in evidence for any public purpose within the view of the Registry Acts, but between private persons and for private purposes: and what is now contended is, that those acts having required these registers to be made for certain purposes, they shall be received as evidence for every purpose; but I cannot adopt the argument to that extent. For every purpose that the statutes have required these public documents to be made, they are evidence by force of the statutes; but when produced for any other purpose, they are stripped of legislative authority, and must be evidence, or not, according to the general principles of evidence. In this case, therefore," he continues, "the registers having been made by third persons, cannot be evidence against the defendant, without proof of their having been acknowledged by him." (*d*)

Registers of Register-counties.

[316]

Those of ships.

(*a*) If the clerk should neglect to enrol it on the day on which it is brought, still the party has done all that lay in his power; the hours are not fixed by the act; R. *v.* Hopper, 3 Pri. 495, 517.

(*b*) Willes, J., in Kinnersley *v.* Orpe, Dougl. 57. In this case there was a proviso in a lease that it should be enrolled with the auditor of the Duchy of Lancaster, and his memorandum, endorsed, was held to be due proof of its enrolment.

(*c*) Molton *v.* Harris, 2 Esp. Rep. 549; see Tunstall *v.* Trappes, 3 Sim. 308. [An attested copy of the memorial of the assignment of a judgment is evidence of the fact of the assignment: so an attested copy of the memorial of the registry of a deed is evidence of the fact of registry; but if the memorial is to be used as evidence of the contents of the deed, the original must be produced; Hobhouse *v.* Hamilton, 1 Sch. & L. 207. The registered memorial of a deed conveying lands, in Middlesex, is *secondary* evidence of the contents of such deed, against the personal representatives of the person by whom such deed was registered; Wollarton *v.* Hakewill, 3 Man. & Gr. 297.]

(*d*) Tinkler *v.* Walpole, 14 East,

Force of a Record.

The force of a Record is practically the same, whether it be proved by production, (*a*) by exemplification, (*b*) or, in the manner described in a former chapter, by a sworn copy. (*c*) But a different degree of credit was given to them formerly, when juries were liable to attainder. It seems to have been the custom to place in the hands of the jury records and exemplifications, which it was imperative on them to believe; "but the chirograph of a fine, a sworn copy, or any other writing, though it may be given in evidence, yet it shall not be delivered to the jury, for these have no intrinsic credit in themselves, and the jury of themselves are not supposed to take notice of them, but they have no credit but what they derive from something else, *viz.* from the oath of the person who attests them," &c. (*d*)

232. [Yet that the ship's register itself is conclusive evidence of the property, upon the policy of the registry acts, see *Ex parte* Yallop, 15 Ves. 60. The examined copy of powers of attorney, enrolled in the Office of Record in Jamaica, held not admissible as secondary evidence of their powers; Faulkner *v.* Daniel, 3 Hare, 221.]

(*a*) [As to which, *vide supra*, p. 151, *et vide etiam*, p. 183.]

(*b*) [*Ut vide supra*, p. 153-4.]

(*c*) [*Supra*, p. 148, *et* p. 149. And as to copies of Record, so called under the "Act for Keeping Safely the Public Records," stat. 1 & 2 Vict. c. 94, *vide supra*, p. 410.]

(*d*) Gilb. on Ev. 18, citing Olive *v.* Gwin, 2 Sid 145. [How such copies should be proved, *vide supra*, p. 156.]

SECTION III. [317]

EFFECT OF JUDICIAL DOCUMENTS.

THE effects of Judicial [Documents,] [Records of the Decrees, Judgments, Sentences,] and Proceedings vary greatly; for they are themselves multiform in their nature and character, and they have wide differences, according to the object for which, and the person against whom, they are produced.

Perhaps the most useful mode of treating the subject will be to consider what consequences would arise, in a Chancery suit, from the production of Document belonging,—first, to other suits in Courts of Equity, (*a*)—then to suits and proceedings in the Courts of Common Law, (*b*)—and, lastly, to suits and proceedings in other Courts. (*c*) Division of the subject.

First, then, of Documents belonging to other suits in Equity. A Decree determining the rights of the parties on the very matter in question, is, as a Plea, a complete bar, and puts an end to the suit at once. (*d*) The questions, whether a given decree sufficiently corresponds with this description in each point, are discussed in Lord Redesdale's treatise. (*e*) I. Documents belonging to suits in Equity. Decrees.

(*a*) [From the 15th of Oct. 1841, (by stat. 5 Vict. c. 5,) the Court of Exchequer ceased to have an Equity side; and the suits then depending were transferred to the Court of Chancery.]

(*b*) [It may here be observed, that in Peerage cases, where the claim to vote in the election of Irish Representative Peers is in doubt, or claimed adversely, the House of Lords requires a printed case, pedigree, and reference to proofs to be given in.

Where the right to the same dignity has been investigated before, in the Irish House of Lords, the minutes of proceedings, evidence, and depositions of witnesses (since dead) admissible, as against all parties, in the English House; Roscommon Peerage case, 6 Cl. & Fin. 97.]

(*c*) [An order to read the proceedings taken in another cause, must be in a suit between the same parties; Eade *v.* Lingood, 1 Atk. 204. Acts of the Court, as a decree or order in another cause between the same parties, may be read without an order; Brooks *v.* Taylor, Mose, 188, and see Sand. Ord. 118; cited *infra*, p. 425, n. (*b*).]

(*d*) [A decree between co-defendants, grounded on pleadings, and proof, between plaintiff and defendants, is regular; Chambers *v.* Dunsany Lord, 2 Sch. & L. 718.]

(*e*) Mitf. on Pl. 237. See also p. 258, *supra*, where the admission of depositions taken in other causes is spoken of; and p. 322, *supra*. Even a private statute, in which the rights of an individual are collaterally pronounced upon, cannot be given in evidence against him, unless he was a party to it; Lord Eldon in Le Marchant's Gardner Peerage case, p. 276.

Before it has been signed and enrolled it cannot be pleaded; and the reason why the imperfect decree, as entered in the Registrar's book, may not be set forth in a plea, is said to be that "minutes are but evidence of the judgment of the Court and the groundwork of the decree; but are by no means conclusive, being often mistaken by the officer, and rectified or varied by the Court upon a summary application." (*a*) But
[318] where the party is, for this reason, precluded from pleading it, the same matter may still be insisted on by way of answer. (*b*) Anything which, in substance might have formed a plea, will be evidence to support allegations in the answer, but will not then form an estoppel. "A decree of the Court of Chancery determining a matter of right, is good evidence of that right as to all persons claiming under the party against whom the decree was made, though at the distance of 100 years afterwards." (*c*) It is not, however, conclusive. (*d*) An objection, which appears to have had weight with Lord Hardwicke, in a cause in which the same plaintiff and defendants were parties, must be almost universally applicable, namely, that there had been no opportunity of cross-examination between the defendants. (*e*) In fact, the rule that a decree shall be a conclusive bar if put forward as a *plea*, is quite an arbitrary one; it is not founded on any principle of evidence, for it merely shows what was the view at that time taken by the Court;

(*a*) De Grey, *arg.* in Charles *v.* Rowley, 2 B. P. C. 485. If, however, the proceeding be mentioned in the bill, advantage may be taken of it, to support a demurrer; Wortley *v.* Birkhead, 3 Atk. 809; Granville Lady *v.* Ramsden, Bunb. 56. The Enrolment of Decrees is now much disused, and in the Exchequer they are not usually enrolled at all; it may be done by a defendant if he please. See Seton on Decr. 395. *Vide supra*, p. 162.

(*b*) Kinsey *v.* Kinsey, 3 Atk. 809; 2 Ves. 577.

(*c*) Borough *v.* Whichcote, 3 B. P. C. 595. [See also Benson *v.* Olive, 1 Barn. K. B. 148. Pleadings and depositions, and a decree in a former suit, the same subject being in issue, are admissible, as showing the acts of parties who had the same interest in it as the plaintiff; Lorton Viscount, *v.* Kingston Lord, 4 Cl. & Fin. 269; and see Leburn *v.* Crisp, 8 C. & P. 397, a case at Nisi Prius.]

(*d*) [A decree in Chancery used, in evidence, at law, for explaining circumstances; Davies dem. Lowndes, ten. 7 Scott, N. R. 141; S. C. 6 Man. & Gr. 47. And see also where, at law, a decree is admissible in evidence, but not conclusive, in Croughton *v.* Blake, 12 Mee. & W. 205; 13 Law J., N. S. 708; 8 Jur. 275; and see Pim *v.* Curell, 6 Mee. & W. 234.]

(*e*) Askew *v.* Poulterers' Co., 2 Ves. 89. [And see Eade *v.* Lingood, 1 Atk. 204, but see also Chambers *v.* Dunsany Lord, 2 Sch. & L. 718, *supra*, p. 421, n. (*d*).]

but it is established on public policy, *ut sit finis litium.* The Court will often, in its discretion, let the decree, when alleged in the answer, have virtually the same effect as a plea, for it does not, willingly, allow the authority of such a proceeding to be shaken. But, in a case like the following, it will take a contrary course. There was an old decree, professing to establish customs of tithing, and modes of payment; some of them obviously not legal moduses, founded on agreements not ratified by the ordinary and patron, and not on a *bonâ fide* adverse suit, to establish the moduses, and pronounced in a cause to which the patron and ordinary were not parties. (*a*) This was held not to be conclusive or binding either on the [319] Church or the Court. (*b*)

The length at which Decrees are drawn up by the Registrar, with a statement of the pleadings, is often of essential utility. Sir W. Horne [Q. C., now one of the Masters,] said, in answer to questions of the Chancery Commissioners, "I think that the value of a decree, particularly at any distance of time, depends very much upon its containing an abstract of the record upon which the judicial order is pronounced.—It has frequently occurred to me, in important cases, to refer to the registrar's book, for the grounds of the decision, and I have known many important arguments turn upon the question. What was the record upon which the decree was pronounced? —Without a decrèe containing an abstract of the record, I think the mandatory part of it would amount to nothing more than the abstract dictum of a Judge.—The value of the registrar's book is chiefly this, that it is the record to which the appeal is made from the printed reports of the cases: where there is a doubt of a fact, reference is made to the registrar's book, and the very circumstance of that doubt shows the importance of it." (*c*)

(*a*) The cause is reported, and the decree set forth in Wood's Tithe Causes, Swaine *v.* Pern, 1 Wood, 341. [And as to a verdict in an action, to try the validity of a modus, brought by the rector, (under the provisions of the act for commuting tithes,) against the landowner, being used against the occupier, see Morris *v.* Ellis, 13 Sim. 3.]

(*b*) Jenkinson *v.* Royston, 5 Pri. 496; and see Att. Gen. and Blair *v.* Chollonley, Ambl. 510.

(*c*) Ch. Com. App. p. 372, Q. 47, &c. [But now, *vide supra*, p. 162, n. (*f*).]

The real justice of the case, the nature of the fact to be proved, and the circumstances, are all taken into consideration. A decree declaring a codicil well proved in a suit, brought against a devisee, by an encumbrancer, would probably be received as almost conclusive evidence, in another suit, brought by another, similar, encumbrancer; so at common law,—"if a verdict be given against the defendant on the same point, though another party were plaintiff, yet in some cases it may be given in evidence, as if there be a trial of title between A. lessee of E. and B., and afterwards there be a trial of the same title between C. lessee of E. and B.; C. may give the verdict found against B. in evidence upon the trial between him and B.; for this was the sense of a former jury on the fact." (*a*)

[320] But a decree, setting aside in one farm, a modus which had been pleaded as a district-modus, would hardly be admissible immediately afterwards in another suit, where the same district-modus was pleaded. (*b*) For, in the former case, there could be no fear of collusion, while in the latter, it would offer an easy mode of fraudulently manufacturing evidence.

To prove the mere fact that a decree has been given in a certain cause, the record itself produced, or the exemplification, or sworn,—or office,—copy, as the case may be, is conclusive. (*c*)

It is said that a judgment, (and *pari ratione*, a decree,) is not evidence of any matter which came collaterally in question, though within the jurisdiction of the Court, nor of any matter to be inferred by argument from the judgment. (*d*) On this principle a decree establishing a will would not be evidence of the presumed testator's death. (*e*) But when a right is neces-

(*a*) Gilb. on Ev. 33. And for an instance in which the parties were the same but the matter in dispute different, see Lewis *v.* Clarges, Gilb. on Ev. 29. [See also as to a modus, Morris *v.* Ellis, 13 Sim. 1, cited *supra*, p. 423, n. (*a*). See also the case of Croughton *v.* Blake, 12 Mee. & W. 205; 13 Law J., N. S. 78; 8 Jur. 275. A trial of an issue, under stat. 6 & 7 Wm. 4, c. 71, s. 46.]

(*b*) Yet see the vicar of Rolvend's case, reported in Gilb. on Ev. 36.

(*c*) Jones *v.* Randall, Cowp. 17. As to the necessity of proving the former proceedings, *vide supra*, p. 162.

(*d*) De Grey, C. J., in Duchess of Kingston's case, 11 St. Tr. 261. [And, as to an interlocutory order, and of what it is evidence, see Pim *v.* Curell, 6 Mee. & W. 234.]

(*e*) That letters of administration are not evidence of the intestate's death, see Thompson *v.* Donaldson, 3 Esp. Rep. 63; and see Hilliard *v.* Phaley, 8 Mod. 180. [And on this, *vide supra*, p. 396, n. (*a*), *et* p. 414, n. (*a*).]

sarily involved in the former decision, although it was not specifically put in issue, the record then becomes evidence of the highest kind, if the same right comes again into question. In an action for diverting the water from a mill, Lord Ellenborough thought himself bound to tell the jury, to consider a verdict, in a former similar action, as conclusive evidence, of the right. (*a*)

Decrees of other Courts of Equity.

[As to Decrees in other Courts of Equity] (*b*) Lord Mansfield once said, in a judgment which has been much controverted, that he "recollected a case of a decree on the Chancery side [321] in one of the Courts of Great Sessions in Wales, from which there was an appeal to the House of Lords, and the decree affirmed there; afterwards a bill was filed in the Court of Chancery, on the foundation of the decree so affirmed; and Lord Hardwicke thought himself entitled to examine into the justice of the decision, of the House of Lords; because the original decree was in the Court in Wales; whose decisions were clearly liable to be examined." (*c*) But Lord Kenyon expressed his amazement at being told that such expressions had been used by Lord Hardwicke, and said he must enter his protest against the position, that any one could alter, or open the discussion of rights, which had been finally and lawfully settled, by a Court of competent authority. (*d*) It is, indeed, highly probable, as Lord Kenyon suspects, and Mr. Justice Buller, in the same case, seems to imply, that the plaintiff, in Chancery, was applying for assistance to carry the former decree into effect; and that he thus gave to the Court a power of inquiring, whether he was in the right, and examining the propriety of the decree itself. This subject will come into question again when we speak of the judgments of inferior and foreign Courts. (*e*)

(*a*) Strutt *v.* Bovingdon, 5 Esp. Rep. 56. A former verdict against a parish for not repairing a highway, is called by Lord Kenyon conclusive evidence, in a subsequent indictment, R. *v.* St. Pancras, Peake's Ca. 219; but see R. *v.* Eardisland, 2 Camp. 494.

(*b*) [By an Order of 16 Jac. 1, 1618-19, Bacon, C., "Decrees in other Courts may be read upon hearing without the warrant of a special order. But depositions, *secus*." Sand. Ord. 118. *Vide supra*, p. 162.]

(*c*) 1 Dougl. 1.

(*d*) Galbraith *v.* Neville, 1 Dougl. 6, note.

(*e*) [As, *e. g*, Visitors', *infra*, p. 435; Bankruptcy, &c, *infra*, p. 436, *et seq.*; and Foreign Courts, *infra*, p. 446, *et seq.*]

Awards.

An award, being a substitution for the decision of the Court, has the same properties, and the same degree of conclusiveness. (*a*) But an award made upon a reference of *all* matters in difference between the parties, does not preclude the plaintiff from suing afterwards upon a matter which was never brought before the arbitrator. (*b*) When the award of commissioners under an act of Parliament is given in evidence, the act must first be proved. (*c*) All notices and other preliminaries directed by the act will be presumed to have been duly given and attended to; but if any circumstance raises a presumption of irregularity, then the doubtful part of the proceedings will require to be proved. This was the case in an indictment against a parish for not repairing a highway: an award under
[322] an Enclosure Act, awarding the highway to be in a different parish, was held inadmissible for the defendants, without showing that the commissioners had given the notices required by the act before they settled the boundaries; the usage causing a suspicion that no notice had been given, for the defendants had, since the award, as well as before it, repaired the highway. (*d*) An award, which is made on an agreement to refer the matters in dispute to arbitration, instead of bringing them into Court, does not, in reality, partake of the nature of judicial proceedings, but is looked upon as part of the agreement. When such an award is used it is necessary to prove the execution, by every one of the parties, of the deed by which they submitted to arbitration; for the consideration to each to execute his own submission was the submission of all the others, and without proof of that, the arbitrators had no authority to make their award between any of the parties. (*e*)

Bills.

As for Pleadings [in Equity,] a Bill is evidence of nothing whatever, except the bare fact of such a bill having been filed. (*f*) It is often necessary that it should be proved, in order to let in the answer or depositions of the witnesses, and then to show what facts were in issue. (*g*) But, of itself, it does not even

(*a*) Campbell *v.* Twenlow, 1 Price, 81; Pitcher *v.* Rigby, 9 Price, 79.
(*b*) Ravee *v.* Farmer, 4 T. R. 146.
(*c*) [*Vide supra*, p. 148-9, as to Acts, Private, Personal, or Local.]
(*d*) R. *v.* Haslingfield, 2 M. & S. 558.
(*e*) Antram *v.* Chace, 15 East, 209.
(*f*) [*Vide supra*, p. 9-10, on this subject. *Sed vide infra*, p. 427, n. (*e*).]
(*g*) Lord Kenyon in Bowerman *v.* Sybourne, 7 T. R. 3.

prove the existence of a suit;—"for it is no suit depending till the parties have appeared or been served to appear, but only a piece of parchment, thrown into the office, which may lie there for ever, and never come to a suit."(*a*) Still less will it be received to prove the truth of its own assertions or denials,(*b*) though it be offered as nothing more than the declaration of an ancestor, in a question of pedigree;(*c*) for bills in equity are notoriously filled with fictitious matter.(*d*) Neither is it [323] allowed to be used against the plaintiff, the assertor of these false allegations, because it has been found, by experience, that, under the present system of pleading, no process is so efficacious [as alleging] in eventually eliciting the truth. The Court looks upon these [allegations] as the mere suggestions of counsel; and connives at statements [and charges] being made, for the sole purpose of putting questions, founded upon them, to the defendant.(*e*) Yet it is possible to transgress this license, and a former bill may be produced to compare with the present and to show, from the deceptious nature of the claims put forward in it, a probability that those now urged are equally unfounded.(*f*)

(*a*) Moor *v.* Welsh Copper Co., 1 Eq. Ca. Abr. 39.

(*b*) Bowerman *v.* Sybourne, 7 T. R. 2.

(*c*) Banbury Peerage case, 2 Selw. N. P. under Eject. Ev. Lord Kenyon once held that, for this purpose, it might be used; Taylor *v.* Cole, 7 T. R. 3, note; and there was formerly an opinion that it was evidence to a certain extent against the plaintiff, see Bull. N. P. 235; Gilb. on Ev. 50. But in the Banbury Peerage case, the question was put in the broadest terms to the Judges, viz., "Whether any bill in Chancery can ever be received as evidence in a Court of law, to prove any facts, either alleged or denied in such bill?" They answered, "Generally speaking, a bill in Chancery cannot be received as evidence in a Court of law, to prove any facts either alleged or denied in such bill."—"But whether any possible case might be put which could form an exception to such general rule, the Judges could not undertake to say." 2 Selw. N. P. 744. Perhaps the description which the plaintiff gives of himself might be evidence, against him, that he went by that name, and had that place of abode and business. [*Sed qu.*]

(*d*) [But every bill in Chancery taken *pro confesso*, under the statute and orders, or an examined copy thereof, may be given in evidence, and be as available as an answer fully admitting the allegations of facts in the bill.]

(*e*) [*Vide supra*, p. 16, n. (*e*). In one case, before Lord Hardwicke, C., it was proposed to read the bill of the plaintiff as evidence for the defendant. His Lordship said, "At law, the rule of evidence is, that a bill in Chancery ought not to be read in evidence; for it is taken to be the suggestions of counsel only: but in this Court it has been often allowed." And the bill was read; Medcalfe *v.* Medcalfe (or Ives), 1 Atk. 63. And so in Handeside *v.* Brown, Dick. 236. As to when and how far a bill in Chancery may be used as evidence in equity, see also Hales *v.* Pomfret, Dan. 141; Bryan *v.* Anderson, 3 Mad. 174; Kilbee *v.* Sneyd, 2 Moll. 207, and Dolphin *v.* D., ibid. 540.]

(*f*) [Where plaintiff read his bill in another cause against the same de-

Answers.

An Answer (*a*) is evidence of almost irresistible strength against the defendant who filed it, or any person claiming under him; for it is a deliberate statement on oath of the truth of all that it contains. (*b*) It is only so far not conclusive that it may be proved to have been sworn under erroneous impressions. (*c*) The answer of an infant by his guardian cannot be read against him in another suit; (*d*) but it may be used against the guardian in a cause which he defends in a different capacity, for it is his admission upon oath. (*e*) It is said, in an old case, in Salkeld, to have been ruled, that "if one makes an answer in Chancery, which is prejudicial to his estate, it may be given in evidence against him, but not against his alienee;" (*f*)

[324]

but there were probably special circumstances which, if reported, would have explained this paradox. (*g*)

The chief inconvenience attending the use of a former answer is, that the party who puts it thereby makes the whole docu-

fendant as evidence, the defendant was allowed to read his answer to it; Dolphin *v.* Dolphin, 2 Moll. 540. And so should the answer of a defendant be read against himself, at Nisi Prius, he will be entitled to have the whole bill read, as part of his opponent's case; Pennell *v.* Meyer, 2 Moo. & R. 99. Answer to a cross bill was not allowed to be read, though the original bill and answer was read, there having been no further proceedings on the cross bill and answer; Bennett *v.* Neale, Wightw. 325.]

(*a*) [An answer in Chancery not replied to, by the plaintiff, is taken to be true, as against him, and available, in that suit, accordingly, see Wrottesley *v.* Bendish, 2 P. Wms. 237.]

(*b*) [Indeed the defendant is not permitted to go into evidence to disprove an admission in his own answer; E. I. Comp. *v.* Keighley, 4 Mad. 16. But yet the plaintiff may read evidence to disprove an allegation, which he has read out of the answer; Price *v.* Lytton, 3 Russ. 206; and see Kempson *v.* Yorke, 8 Pri. 16.]

(*c*) [On motion for an injunction to stay proceedings at law, an answer is evidence, for the defendant, as to all facts to which other evidence could be received; Bott *v.* Birch, 4 Madd. 255.]

(*d*) Eccleston *v.* Petty, *vide supra*, p. 28. [An admission in the answer of a *feme covert*, joining with her husband, will not be permitted to be read against her; Hodgson *v.* Merrest, 9 Pri. 563.] *Vide supra*, p. 28-9. [But that of a superannuated person, put in by his *quasi*-guardian, may be used against him; Leving *v.* Caverly, Pr. Ch. 229.]

(*e*) Beasly *v.* Magrath, 2 Sch. & Lef. 34. [*Et vide supra*, p. 29.]

(*f*) Ford *v.* Grey, Salk. 286; [and as to its being used against his surety, see *ex parte* Walker, 3 Dea. 642.

On the trial of an indictment for a conspiracy, the defendant's answers in a suit in Chancery, instituted by the prosecutor, are receivable in evidence, on the part of the prosecution; Reg. *v.* Goldshede, 1 Car. & K. 657. And as to the use of such at law, see also Chappell *v.* Purday, 14 Law J., N. S. 258.]

(*g*) See Dartmouth Lady *v.* Robarts, 16 East, 344. [There being no issue joined between co-defendants, the answer of one cannot be read against the others, even as to costs, other than as a suggestion on which the Court may direct an inquiry before the Master; Chervett *v.* Jones, 6 Madd. 267; and see Green *v.* Pledger, 3 Hare, 165; Montague *v.* Hill, 4 Russ. 128. As to reading from a defendant's answer, see also Haworth *v.* Bostock, 4 Yo. & C. 1. On interpleader the answer of one defendant may be read against the other; Bowyer *v.* Pritchard, 11 Pri. 103.]

ment available for his adversary as well as himself. (*a*) Even where a party offered a sworn copy of a book, to which his adversary had referred in an answer in Chancery, and which, in pursuance of an order he had left for inspection at the Master's office; Lord Tenterden held, that "this was the same as if the whole book were appended to the answer, or the answer expanded to the extent of the book; and that advantage could not be taken of an inspection, obtained through a conventional and economical proceeding, between the parties in the Chancery suit, to give in evidence a part of the answer, without reading the whole." (*b*) But when it is introduced merely for the purpose of showing the incompetency of the witness, its use will be confined, to so much as relates to that single point. (*c*) The party who puts it in does not indeed admit the truth of every thing contained in it, but he places on record *primâ facie*

(*a*) "You shall not take only what makes against him and leave out what makes for him, for the answer is read as the sense of the party himself and must be taken entire and unbroken." Gilb. on Ev. 51. If, upon exceptions taken, a second answer has been put in, the defendant may insist upon having that read to explain what he swore in his first answer; Bull. N. P. 237. [The old rule was, that the plaintiff might stop at the end of the sentence; but now the Court allows the defendant to have read that which immediately follows, upon the same subject; Calcott *v.* Maher, 2 Moll. 316. Defendant may read his answer to explain the schedule to it, read by the plaintiff; Skerrett *v.* Lynch, 2 Moll. 320. If a plaintiff reads a passage in an answer, which does not refer to, but is qualified by, a subsequent passage, the defendant may read the latter; Rude *v.* Whitchurch, 3 Sim. 562; and see Wolley *v.* Brownhill, 1 M'Clel. 326; S. C. 13 Pri. 500, *supra*, p. 16, n. (*b*). If a plaintiff reads a passage from the answer, as evidence, he is compellable to read all other passages in the answer which are explanatory of the passage read, whether such other passages are connected in point of grammatical construction or separated by passages relating to distinct subjects; Nurse *v.* Bunn, 5 Sim. 225. If the plaintiff read a passage from the answer of a defendant, as evidence of a fact mentioned therein, the defendant has no right to read subsequent matter connected with it by such words as "but" and "for," unless the subsequent matter be explanatory of the passage read by the plaintiff, Davis *v.* Spurling, 1 Russ. & M. 64; *ut sup.*, p. 16. When the answer of a party in another cause is resorted to as evidence the whole is admissible, both at law and in equity; Boardman *v.* Jackson, 2 Ball & B. 386.

A deed set out in the answer of defendant, is made evidence for the plaintiff, generally; Att. Gen. *v.* Higham, 2 Yo. & C. 634. And on this subject, *vide supra*, p. 22, *et seq.*]

(*b*) Anon. cited 2 B. & Ad. 285. But in a case similar, except that the document had been only left with the party's solicitor for inspection, Lord Tenterden thought it not completely identified with the answer. He said, "Whether it is necessary in every instance to read an answer in Chancery for the purpose of making any documents evidence, which may be annexed to it, we do not now decide. I should at present think it a very strong proposition to say that the answer must at all events be read, though having no connexion with the case in which the documents are produced." Long *v.* Champion, 2 B. & Ad. 284.

(*c*) Sparin *v.* Drax, 2 Bac. Abr. 622.

evidence of all the facts that it asserts. It may cost him some trouble to overthrow the wall which he has thus raised against himself, and a plaintiff may possibly find that he has thrown
[325] away his right of reply by furnishing all the proof necessary for the defence.

No objection, which the party who introduces this evidence could make to it, in the hands of his adversary, is waived, except its being the testimony of a party to the suit; consequently when it speaks only from information and belief, it is still objectionable, as hearsay; (*a*) "but whether the party, against whom it is read, be entitled to have such parts of it as are not expressly sworn to, left to the jury, as evidence, (however slight,) of any part, does not appear to have been hitherto decided." (*b*)

Where there is any confidence or trust between the parties, the confession of one, in an answer, or his admissions, in any other proceeding, may be given in evidence against the other. (*c*)

The utility and effect of Depositions and Affidavits taken in another suit, have been already discussed under the head of Secondary Evidence. (*d*)

II. Documents belonging to actions and other proceedings at common law.

Secondly; Many documents may be brought from the Courts of Common Law, and from other tribunals, acting under the authority of the common and statute law, which are available in Evidence.

Verdicts and judgments.

Verdicts and Judgments, as being the most important, shall be the first objects of our inquiry.

In the case of *Meadows* v. *The Duchess of Kingston,* (*e*) Lord Apsley says, "I lay it down as a general rule that wherever a matter comes to be tried in a collateral way, the decree, sentence, or judgment, of any other Court having

(*a*) Pellatt *v.* Ferrers, 2 Bos. & Pul. 548. [Declarations (or admissions rather) in an answer, of a person in possession of an estate, are admissible in evidence, against him and persons deriving from him: but declarations by him of what he heard another person say, not adding that he believed the statement, are not admissible, to cut down or defeat his estate; Roe d. Trimleston, Lord *v.* Kemmis, 9 Cl. & Fin. 780.]

(*b*) Note of the Reporters, *ibid.*

(*c*) Lord C. Cowper in Hiliard *v.* Phaly, 8 Mod. 182; and *vide supra,* p. 29.

(*d*) [As in Pimm *v.* Curell, 6 Mees. & W. 234;] *vide supra,* p. 256, *et seq.*

(*e*) Ambl. 761.

competent jurisdiction, shall be received as conclusive evidence of the matter so determined." When the same case came afterwards, in a different shape, before the House of Lords, C. J. De Grey laid down the rules of law on the subject, with this distinction: "From a variety of cases, relative to judgments being given in evidence in civil suits, these two deductions seem to follow, as generally true:—first, that [326] the judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, between the same parties, upon the same matter, directly in question, in another Court;—secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is in like manner conclusive, upon the same matter coming incidentally in question, in another Court, between the same parties, for a different purpose." (*a*) But the first of his principles is by no means applicable, as between the Courts of Equity and the Courts of Law. It is well known, that in the time of Lord Ellesmere, the Judges asserted an authority conclusive against the interference of equity in all matters which they might decide, but that the Chancellor, after a severe struggle, established his right to give relief according to equity, notwithstanding he might run counter to the decisions of common law, or even partially or wholly reverse them. (*b*) Thus, then, as far as the jurisdiction of the Courts of Equity extend, they have not only a concurrent, but a controlling, authority over the verdicts and judgments of common law. Some observations, applicable to verdicts and judgments becoming thus incidentally cognizable in a Chancery suit, have been anticipated a few pages back, in discussing the effect of Decrees.

(*a*) Duchess of Kingston's case, 20 Howel's St. Tr. 538.

(*b*) "A question being raised in the Court of King's Bench, whether, after a judgment given at the common law, the Chancery could in any case give relief in equity? or whether it were not debarred thereof by the statutes of 27 Edw. 3, c. 1, and of 4 Hen. 4, c. 23, King James taking notice of that difference, (and taking himself to be the judge, of the jurisdictions, of his Courts of Justice,) did seriously advise thereupon with his learned counsel, upon whose opinions and certificate he did give judgment for the Chancery, and accordingly all things were in peace." App. to 1 Ch. Rep. p. 1. [See an Ord. of 14 Jac. 1, 18th July, 1616; Sand. Ord. 89. The whole proceedings, as enrolled in Chancery, are there set forth. And see Spence on the Equitable Jurisdiction of the Court of Chancery, p. 3, *et seq.*]

How far they are available when brought forward in the shape of a plea, may be seen in Lord Redesdale's treatise. (*a*)

When the verdict or judgment of the Court of Law has been pronounced on a matter which does not lie within the jurisdiction of Equity, or which does not contain any circumstances for the interference of Equity to be grounded upon, then the second of the principles laid down by C. J. De Grey applies; for it must then be looked upon in the same light as the decision of an exclusive jurisdiction. (*b*)

[327]

The latitude with which the words "between the same parties" are to be understood, is the same as in the case of Decrees, but not more extensive. This is one reason why a verdict in a criminal trial cannot be produced, as evidence of the fact which it declares. [A rule to which we shall presently more particularly advert.]

Purposes for which such are introduced.

But the purpose for which the verdict or judgment is offered in evidence, furnishes a criterion of its admissibility; that is, whether its object be to prove the fact on which it is founded, or to prove a right, or a state of circumstances involving a point of law. An example will make this clearer. If an estate were limited to A. and his heirs, with a limitation over, in case of the determination of that estate by forfeiture or otherwise, to B., the record of a sentence passed on A., for treason, would be a complete proof of B.'s title; but if the limitation were worded thus, "in case of A.'s committing any act of treason," &c., then the record would not be evidence. In the first instance it is by virtue of the judgment itself that A. is an attainted man, and his estates forfeited; in the second, a "*res inter alios acta*" is adduced, in proof of a fact. (*c*) Upon the same principle a conviction of a *crimen falsi* proves a witness incompetent and deprives all persons (*c*) of the benefit

(*a*) Mitf. on Pl. 253.

(*b*) [A judgment at law, between the same parties, after bill filed in equity, was held to be admissible; but the defendant entitled to an inquiry whether it was fairly, or under any and what other circumstances obtained; Pearce *v.* Gray, 7 Jur. 250. If fairly obtained, to be conclusive in equity as to such facts, of which it was conclusive at law; S. C.]

(*c*) Thus "a conviction at the suit of the King for a battery, cannot be given in evidence in trespass for the same battery;" Bull. N. P. 233.

(*d*) [*Sed vide supra*, p. 326, *et seq.*]

of his testimony. (*a*) And upon the same principle again, a verdict against a Master for an injury sustained through the negligence of his servant, might afterwards, in an action brought by the Master against the servant, be given in evidence, as to the quantum of damages, though not as to the fact of the injury. (*b*) The effect of a verdict in an action of ejectment, was determined by the opinion of the twelve Judges, in the case of *Aslin* v. *Parkin*; (*c*) "the lessor of the plaintiff [328] and the tenant in possession are, substantially and in truth, the parties and the only parties;—there is no distinction between a judgment in that action upon a verdict and a judgment by default;—the tenant is concluded by the judgment, and cannot afterwards, in an action for the mesne profits, controvert the title;—but the judgment is conclusive, only as to the subject-matter of it;—beyond the time laid in the demise, it proves nothing at all;—neither does it prove any thing as to the length of time the tenant has occupied, nor as to the value."

Verdicts in Criminal matters.

Verdicts in Criminal matters are inadmissible as evidence of facts, [as we hinted above,] on a further ground of public policy; for as the trial may have been decided on the testimony of the very adversary himself who now seeks to use it, or of some one suborned by him, not only might a man circuitously give evidence in his own cause, but the perjury, to which a temptation would be opened, might be of the worst description, and attended with the most serious consequences. (*d*) On this

(*a*) [Except as to suits commenced since 1st Nov. 1845; *vide supra*, p. 326.]

(*b*) Green v. New River Co. 4 T. R. 589.

(*c*) 2 Burr. 668.

(*d*) See Gilb. on Ev. 31. [*Et supra*, p. 347, n. (*d*).] But when a prisoner pleads guilty, his plea is ever afterwards evidence against him as an admission; see 1 Stark. on Ev. 235.

["That felonies whereof parties have been convicted, are not re-examinable in other Courts," is true *sub modo*, not only of felonies, but also (at least of one species) of misdemeanors. But the suit in which the verdict of conviction was deemed conclusive (in certain cases, of Searle, Boyle, Bromley, &c.) was this: it was a personal suit, founded immediately upon that offence of which the defendant (the party proceeded against) had been so convicted. Consequently, none of those cases are in point, as to the verdict being held admissible evidence, much more as to its being conclusive evidence, in a civil cause, upon a mere question of property between plaintiff and defendant;" *per* Sir John Nicholl, in Wilkinson v. Gordon, 2 Add. R. 158-9. An extract from a (so called) Police record, annexed to an allegation of the owners, in a suit for wages, and in proof of the manners and misconduct, was rejected, by the Admiralty Court, in Susan Hamilton, 2 Hagg. 229, n.]

point, however, there have been some doubts; but where the circumstance has actually happened of the party himself having given evidence as a witness, they have always been carefully excluded. In a case where "cross-bills had been filed in Chancery for redeeming and foreclosing mortgaged premises, wherein it became a material question, Whether the defendant, (the plaintiff in the bill of foreclosure,) had notice of the assignment of the equity of redemption to the late husband of E. K., (the plaintiff in the bill for redemption,) which she had sworn in the affirmative in her answer, as the defendant had sworn in the negative in his? she was admitted by Lord Kenyon as a witness, in an indictment for perjury against the defendant, for such denial of notice; on the ground that she must adduce other evidence than her own to prove her case in
[329] Chancery." (*a*) And in the case in which this is cited, Lord Ellenborough says, "no instance has been mentioned to show that a Court of Equity would look at a conviction for perjury, procured on the testimony of a party, in order to sustain that party's interest." (*b*) There is an additional reason against admitting an acquittal; that as very strong evidence is necessary to convict a prisoner, a verdict in his favour is but a slight argument that the fact of which he was accused is not true. (*c*)

Acquittals.

The above appear to be the rules which a Court would be most likely to follow; but there are conflicting decisions and opinions, and the subject contains many difficulties which have been discussed in works of the highest authority. (*d*)

Judgments, &c. in Courts not of records.

Verdicts and Judgments in Common-law Courts, not Courts of record, (*e*) stand nearly on the same footing with the Decrees

(*a*) R. *v.* Pepys, cited *arg.* 4 East, 578.

(*b*) R. *v.* Boston, 4 East, 581; and see Bartlett *v.* Pickersgill, *ibid* note; Burdon *v.* Browning, 1 Taunt. 520.

(*c*) Gilb. on Ev. 33.

(*d*) See Phil. on Ev. part 2, c. 2, s. 3; 1 Stark. on Ev. 324. [Judgments and verdicts in the superior Courts, when evidence in subsequent actions at law; see Pritchard *v.* Hitchcock, 6 Man. & Gr. 151; S. C. 6 Scott, N. R. 851; Caernarvon, E. of, *v.* Villebois, 13 Mees. & W. 313; S. C. 14 Law, J., N. S., 233. Neither the issue delivered nor the nisi prius record in an action between the same parties admissible, as proof of the facts stated on the pleadings, when no judgment had been had; *semble aliter*, if it had been signed; Holt *v.* Miers, 9 C. & P. 191.]

(*e*) [The distinction, as to Courts, *vide* Co. Lit. 260 *a*, *et vide supra*, p. 153.]

of the inferior Courts of Equity. (*a*) Lord Mansfield's controverted judgment in *Walker* v. *Witter* classes them together; and the opinions in opposition to him which we have discussed above are equally applicable here. (*b*) That case will be noticed again when we speak of Foreign Judgments.

Sentences by Visitors.

A Sentence of deprivation, pronounced by the Visitor against a member of a College, is conclusive evidence that he no longer belongs to the society. This was decided in the great case of *Phillips* v. *Bury*, which was an action of ejectment, for one of the estates of Exeter College. (*c*) It is a strong instance of the extent to which the rule is carried, that "Courts of Law pay such deference to the judgment of each other in matters within their jurisdiction that the first determination by a proper tribunal ought to prevail." (*d*) The Tribunal of the Visitor scarcely bears the semblance of a Court of Justice: as Lord Mansfield says, "he does not proceed by the rules and forms of the common law; but he suffers a party *allegare non allegata, et probare non probata*, and decides entirely upon the merits." (*e*)

[330]

Judgments *in rem*—in the Exchequer;

A Judgment *in rem* in the Exchequer, which is pronounced upon the subject-matter itself, without reference to the interests of individuals, having been established by law, from motives of public policy, to be final and irrevocable, is conclusive in evidence. The cases are ably discussed, at some length, by Mr. Phillipps. (*f*) It seems from them that a condemnation, either by the Court of Exchequer, (*g*) or by the Commissions of Excise, (*h*) is evidence against all persons. A record of condemnation, however, for goods seized for an act of forfeiture under one statute, is not evidence on a charge of an offence,

—or by Commissioners of Excise.

(*a*) [As to evidence, in an action at law on a judgment of a Court Baron, see Dawson *v.* Gregory, 14 Law, J., N. S. 286; S. C. 9 Jur. 688.]

(*b*) *Vide supra*, p. 359, and *infra*, p. 440.

(*c*) Reported in Comb. 265, Rep. t. Holt, 715, 1 Show. 360, 4 Mod. 106, Skin. 447, Ld. Raym. 5, and 2 T. R. 346.

(*d*) C. J. Lee in Roberts *v.* Fortune, 1 Hargr. Law Tr. 468, n.

(*e*) In R. *v.* Grundon, Cowp. 322; in which case a sentence of expulsion without the aid of the Visitor was held conclusive evidence.

(*f*) 1 Phill. on Ev. part 2, c. 3, s. 3.

(*g*) Scott *v.* Shearman, 2 Bl. Rep. 979; Atty. Gen. *v.* King, 5 Pri. 195, and the cases cited there.

(*h*) Terry *v.* Huntington, Hardr. 480: Fuller *v.* Fotch, Carth. 346, Rep. t. Holt, 287; Roberts *v.* Fortune, 1 Harg. Law Tr. 468, n. But see *contra* Henshaw *v.* Pleasance, 2 Bl. Rep. 1174.

Acquittals.

against the same party, with respect to the same goods, created by another statute. (*a*) Lord Kenyon is reported to have said, that an acquittal was conclusive evidence of the illegality of a seisure, but it is probable that if the question came formally before a Court for its decision, the verdict would be held conclusive only against the crown. (*b*)

Proceedings under Commissions of Bankruptcy.

A Commission of Bankruptcy is said, by Lord Ellenborough, to be "considered, at law, as a proceeding to which all the world are parties;" and Mr. Justice Holroyd adds, "the commission exercises jurisdiction over the thing itself; it is like the proceedings *in rem* in the Exchequer." (*c*) Yet it is laid down, in a work of high authority, that "the fact that commissioners have already declared the party a bankrupt is not even *primâ facie* evidence of the bankruptcy, for they act on *ex parte* evidence, and have a mere authority without jurisdiction; and, consequently, their determination is not in the [331] nature of a decree or judgment by a Court of competent authority." (*d*) The point is of the less consequence, because, as the law now stands, by the Stat. 1 & 2 Wm. 4, c. 56, s. 17, "the adjudication of the commissioner," (or the verdict of an issue to set it aside, which has been tried in the Court of Review, as there directed,) "shall, in all cases, as against the bankrupt, and also as against the petitioning creditor, and as against any assignee to be chosen of any such bankrupt's estate and effects, and as against all persons claiming under the said assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was, or was not, a bankrupt, at the date of such adjudication, (*e*) any other act, debt, or trading than the act, debt, or trading proved at such trial notwithstanding: providing always, that an appeal shall be to the Lord Chancellor from the decision of the said Court of

(*a*) Atty. Gen. *v.* King, 5 Pri. 195.
(*b*) Cooke *v.* Sholl, 5 T. R. 255.
(*c*) Jervis *v.* Grand Western Canal Co., 5 M. & S. 78.
(*d*) Stark. on Ev. 87. He cites Ld. Raym. 580, where it is only said *arg.* that "the commissioners of bankrupts have only an authority and not a jurisdiction." Lord Coke seems to imply that their adjudication is *primâ facie* evidence, when he says, "a man may traverse that he was not a bankrupt, though the commissioners affirm him to be one;" 8 Co. Rep. 121.
(*e*) [The date of the Fiat is *primâ facie* evidence of the time of its issuing, under stat. 6 Geo. 4, c. 16, s. 6; *ex parte* Rowe, 1 Mont. & Ch. 334.]

Review, upon matter of Law or Equity, or on the refusal or admission of evidence only." (*a*) When Sir T. Plumer was Vice Chancellor he rejected the commission and proceedings when offered to prove that a conveyance under which the plaintiffs claimed had been executed subsequently to an act of bankruptcy, for he said, "Before the 49 Geo. 3, the validity of the commission must have been established by proof of the requisite circumstances; although there was no intention to dispute them, and the party was not unfrequently defeated, upon the formal defect of his evidence. To remove this mischief, by dispensing with the necessity of the proof, when the commission was not in issue, was the object of the Legislature. The bankruptcy, that is, the matter of the bankruptcy, not the particular act of bankruptcy, is that alone which the commission, and the proceedings under it, are to establish. To admit them, not to sustain the title under the commission, but incidentally to invalidate the rights of strangers, would produce the grossest injustice, in affecting the interest of a party by evidence, of which, till the moment it is produced, he is in ignorance, and which has been taken without any opportunity of its being met either by direct, or by cross-examination." (*b*) The same reasoning applies to subsequent statutes. But where trustees under a marriage settlement were to pay an annuity to the wife "in case the husband should be declared a bankrupt, Sir J. Leach, M. R., (in a suit against the trustees for an account, and against the wife for what she had received of the annuity,) admitted the commission and proceedings, as *primâ facie* evidence of his having been so "duly declared;" at the same time giving the plaintiffs permission to take measures for superseding the commission. (*c*) A writ of *super-*

Commission and other proceedings.

[332]

Supersedeas.

(*a*) For the law as it stood before this enactment, and for observations on Sir S. Romilly's recommendation to make the adjudication, when acquiesced in by the bankrupt for a certain period, final in all cases, see 1 Ld. Henley on Bankruptcy, 369; and Cooke on Bankruptcy, cited *ibid*, 368.

(*b*) Whitmore *v.* Graham, 2 Rose, 364; 1 Ld. Henley on Bankruptcy, 369. [Infant defendants are not precluded, as to question of bankruptcy, by production of commission, though no notice of intention to dispute has been given; Bell *v.* Tinney, 4 Mad. 372.]

(*c*) Boultbee *v.* Boultbee, MS. 15th July, 1833. [And as to the date of the bankruptcy, *vide supra*, p. 436, n. (*e*). The examinations of A., taken before commissioners, under the bankruptcy of C., although included in an order obtained, cannot be read, unless it is

sedeas, reciting that a commission issued on a day certain, was held to be evidence, against a third party, to show that such a commission issued on that particular day. (*a*)

Under Inquisitions of Lunacy, &c.

When an Inquisition of Lunacy, offered as evidence to affect the right of a third person, was opposed, Lord Hardwicke overruled the objection, and said that "inquisitions of lunacy, and likewise other inquisitions, as *post mortem*, &c., are always admitted to be read, but are not conclusive evidence, for you may traverse them if you please." (*b*) There was formerly a doubt how far the Verdict of a Coroner's jury, declaring the deceased to have been a lunatic, is evidence against his executors; Lord Coke considering it conclusive, (*c*) Lord Hale holding it to be traversable:—the ground of hardship mentioned by the latter, namely, that the inquest was taken behind the backs of the executors, does not now hold good; for it is settled that they may, if they please, remove it into the King's Bench, and traverse it there. (*d*)

Verdict on an Inquest by a Coroner.

[333]

Certificates.

Certificates, which bear the character of judgments, by Courts of competent jurisdiction, are conclusive as to the matters which they decide. (*e*) Thus in the case of *Moody* v. *Thurston*, (*f*) where the plaintiff produced a certificate given to him by certain commissioners appointed for stating the debts of the army, who had power to call officers and agents before them, and if it appeared there was money due from one to another, to give the party a certificate, upon which he might maintain the action, as upon a stated account; the defendant offered in evidence his accounts, showing that at that time he had had no money in his hands; "and, besides, the commissioners had never heard him, but on the first summons made the certificate, and refused to give him time to produce his accounts: But Lord Camden, (then C. J. Pratt),

proved in the cause that there were such examinations so taken; Eade v. Lingood, 1 Atk. 203.]

(*a*) Gervis *v.* The Grand Western Canal Co., 5 M. & S. 76.

(*b*) Sergison *v.* Sealy, 2 Atk. 412.

(*c*) 3 Inst. 55.

(*d*) See a note 1 Saund. 362. It is an anomaly that if the coroner's inquisition find that the person who killed the deceased fled for it, this finding is conclusive; *ibid.*

(*e*) The conclusiveness of the ancient Trial by Certificate has been mentioned above; *vide supra*, p. 254, n. (*a*). For the effect of the certificate of a bankrupt, see the stat. 6 Geo. 4, c. 16, s. 126.

(*f*) 1 Str. 481.

would not let him go into evidence, being of opinion that the certificate was conclusive." (*a*) Thus also, when the costs of a "frivolous and vexatious" election petition or defence, have been taxed and reported to the Speaker, he "shall, upon application made to him, deliver to the party or parties a certificate, signed by himself, expressing the amount of the costs, expenses, and fees, allowed in such report, together with the name of the party liable to pay the same;—and such certificate so signed by the Speaker, shall be conclusive evidence of the amount of such demands, in all cases and for all purposes whatsoever." (*b*)

That of the Speaker, as to costs, &c.

But a certificate will not have authority beyond the matter which it is strictly empowered to prove. Lord C. J. Willes, expressed his disapprobation of an old case, (*c*) in which "it was holden, that a certificate under the seal of the town of Utrecht, and of the Minister there, of the marriage of two persons, *and that they cohabited together* as man and wife, was sufficient proof: To admit," he said, "the certificate of the minister as to the fact of the marriage at a place where there is no bishop, might, perhaps, be equal, and be resembled to, the certificate of the bishop here, which is in some cases conclusive evidence of a marriage; but I am clearly of opinion that the certificate of their cohabiting together ought not to have been admitted." (*d*)

Some not admitted.

[334]

Thirdly; There are many documents of great utility which are brought from Courts where laws are administered different from the Common Law of England.

III. Documents belonging to Ecclesiastical and other Courts.

(*a*) [And so the Master's certificate of the propriety of a commission to examine witnesses abroad, has been held conclusive, although alleged to have been granted without an affidavit.]

(*b*) Stat. 9 Geo. 4, c. 22, s. 60; Margrave *v.* White, 8 B. & C. 412. [The Court will presume that the Speaker, giving a certificate pursuant to the stat. 9 Geo. 4, c. 22, s. 33, has availed himself of the proper sources of information, to enable him to so grant the certificate, without his stating on the face of it what these sources are; Stockdale *v.* Hansard, 8 Dowl. 669; see also Fector *v.* Beacon, 5 Bing. N. C. 302, and 7 Dowl. 285. The certificate is conclusive, as to the amount of costs specified in it; and see Rawson *v.* Dundas, 3 Bing. N. C. 123; 3 Sc. 429; and S. C. 5 Dowl. 207, 489; Bruyeres *v.* Halcombe, 5 Nev. & M. 149, and 3 Ad. & Ell. 381; and see 1 Sc. 429, and 5 Dowl. 489.]

(*c*) Alsop *v.* Bowtrall, Cro. Jac. 542; the question was as to the legitimacy of a posthumous child.

(*d*) In Omichund *v.* Barker, Willes, 549. [As to evidence of that, *vide supra*, p. 307, *et ibid.*, n. (*e*).]

Sentences, —of the Ecclesiastical Courts;

respecting marriage;

To the Sentences of the Ecclesiastical Court a special deference has always been paid in those matters which belong peculiarly to their jurisdiction. According to Lord Coke, it was adjusted that "forasmuch as the conusance of the right of marriage belongs to the Ecclesiastical Court, the Judges of our law ought, when the same Court has given sentence (although it be against the reason of our law,) to give faith and credit to their proceedings and sentences, and to think that their proceedings are consonant to the law of Holy Church, for *cuilibet in sud arte perito est credendum*, and so have the Judges of our laws always done." (*a*)

Case of the *Duchess of Kingston*,

The great authority on this subject, is the celebrated case of the Duchess of Kingston; who was tried for bigamy, and pleaded that the Ecclesiastical Court had pronounced sentence against the first husband, for jactitation of marriage. The case was argued most learnedly on both sides, and it contains that remarkably clear exposition of the law, the opinion delivered by C. J. Lee, on the questions submitted to the Judges. The following is an extract: "Upon the subject of marriage, the Spiritual Court has the sole and conclusive cognizance of questioning and deciding, directly, the legality of marriage; and of enforcing, specifically, the rights and obligations respecting persons depending upon it; but the Temporal Courts have the sole cognizance of examining and deciding upon all temporal rights of property,

[335]

and so far as such rights are concerned, they have the inherent power of deciding, incidentally, either upon the fact or the legality of the marriage; where they lie in the way to the decision of the proper objects of their jurisdiction: they do not want or require the aid of the Spiritual Courts; nor has the law provided any legal means of sending to them for their opinion." (*b*) But, he adds, that the Judges used in certain real actions to refer to the Ordinary for his certificate on such points, which, when returned, was entered on record, and then became conclusive evidence. (*c*) A Court of Equity would

(*a*) Bunting *v.* Lepingwell, 4 Co. Rep. 29.

(*b*) Duchess of Kingston's case, 20 Howell's St. Tr. 538.

(*c*) Where bastardy was to be certified, proclamations were necessary; see stat. 9 Hen. 6, c. 4, s. 2. [And as to this, see Ridley's View of the Civil and Ecclesiastical Laws of England, Art. Bastardy, affording fuller information.]

give the parties permission to try the question in the proper Ecclesiastical Court, and would allow it to be considered as part of the proceedings in the cause. Still, as [Dr. Calvert, (*a*)] counsel for the Duchess of Kingston, very fairly stated, in his argument, "Marriages may, indeed, incidentally, come to be discussed and determined in the Courts of common law, and, in many cases, it is absolutely necessary to the due administration of justice; but it will not be found, that where the proper forum has given a decision upon the point, the common law Courts have ever taken upon themselves to examine into the ground, or at all question the validity, of that sentence." (*b*) He cited, amongst others, Kenn's case, in which a marriage had been declared invalid; and the Judges, saying that they would give the same credit to the sentences of the Ecclesiastical Courts which those Courts gave to the judgments at common law, (*c*) refused to investigate the sentence; although it had been manifestly grounded on false suggestions. (*d*) Courts of Equity seem to have gone to a greater length in this deference to Spiritual Courts than the Courts of law were disposed to follow them. The Exchequer in Ireland held that, even in a cause of jactitation of marriage, the sentence of the Ecclesiastical Court was conclusive, until set aside; notwithstanding that the proceedings there were a tissue of fraud and collusion; and the House of Lords held the same, on appeal. (*e*) [336] And when the Duchess of Kingston's case came before Lord Bathurst, in the Court of Chancery, he allowed it as a plea. (*f*) Obvious objections to its conclusiveness, may be drawn from the nature of a cause of jactitation, in itself an inconclusive proceeding; and much learning in answer to those objections may be found in one of Hargrave's Law Tracts. But in the last mentioned case the real effect of such a sentence was fully discussed before the House of Lords, and the Judges declared

argument of Dr. Calvert

(*a*) [Afterwards Dean of the Arches and Judge of the Prerogative Court.]

(*b*) Howell's St. Tr. 391.

(*c*) [The record of the judgment, setting forth a verdict, finding a custom, is conclusive evidence in the Ecclesiastical Court, of the existence and validity of the custom; Ely Bp. of, *v.* Gibbons, 4 Hagg. 156.]

(*d*) 7 Co. Rep. 43.

(*e*) Hatfield *v.* Hatfield, 5 B. P. C. 100.

(*f*) Meadows *v.* Duchess of Kingston, Ambl. 756; and see several cases cited there.

their unanimous opinion;—that a sentence in the Spiritual Court against a marriage, in a suit of jactitation of marriage, is not conclusive evidence, so as to stop the counsel for the crown; from proving the marriage, in an indictment for polygamy: but admitting such sentence were conclusive, the counsel for the crown might be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud, or collusion. (*a*) It is probable that the law as thus laid down would now be adopted by the Courts of Equity. (*b*)

—respecting Wills and Administrations.

The same great case contains also ample discussions on the other principal branch of the jurisdiction of the Ecclesiastical Courts, its control over Wills and Administrations. (*c*) The counsel on both sides fully admitted its authority there. "The office of granting probate and administration is a special authority committed to the Ecclesiastical Courts; where all who claim interest may be heard; so there can be no defect of justice. Therefore, in a vast abundance of cases, from *Noel* v. *Wills*, soon after the

(*a*) [A man's answer in the Spiritual Court may be read against him in this Court; Mildmay *v.* Mildmay, 1 Vern. 53. Personal answer of a defendant to a libel in the Ecclesiastical Court, preserved among the records of the register, held admissible evidence, in a suit for tithes in the Exchequer, by a party claiming under the same title as the person whose title it was; Taylor *v.* Cook, 8 Pri. 664.]

(*b*) Hiliard *v.* Phaley, 8 Mod. 180, is another instance of the great strictness of the Common Law Courts; they had rejected a sentence in the Spiritual Court carried on in a regular suit and pronounced in the lifetime of the parties, that they are guilty of fornication; offered as evidence, to show there was no marriage: but Lord Cowper said, "What could be better evidence?" and he thought it hard that it had been rejected.

[In an action at law for the costs of proceedings in the Consistory Court, and the suit being removed, by appeal, in the Arches and High Court of Delegates successively; held, the judgment in the Arches Court was inadmissible, without production of the process of appeal; viz. the transcript of the proceedings, sent up to show on what the judgment rested; Jeake *v.* Westmeath M. of, 2 Mood. & R. N. P. 394. Sentence of the Spiritual Court was held admissible (but not conclusive) evidence, as to the non-reconciliation between husband and wife; in Bateman *v.* Ross, Css. of, 1 Dowl. 325. Sentence in the Spiritual Court for fornication, &c. in a criminal way, is not evidence against the issue; otherwise, if on the point of the marriage and no collusion; Brownsward *v.* Edwards, 2 Ves. 245.]

(*c*) [As to wills relating to personalty, an executor of such cannot sustain a bill without showing thereby, or at least alleging, that he has duly proved the will in the proper Ecclesiastical Court: without that allegation the bill would be demurrable, but he need not specify the Court; Humphreys *v.* Ingleton, 1 P. Wms. 755. Nevertheless neither probate copy of a will nor letters of administration, is any evidence in the Court of Chancery, of the decease of the alleged testator or intestate; Moons *v.* De Bernalis, 1 Russ. 301. The case of a conviction, at the Old Bailey, in April, 1844, of certain persons, for the forgery of the will of Miss Ann Slack, (who was proved to be alive,) has even yet more fully shown the little reliance which can be put upon such evidence, even for practical purposes; as *e. g.* in support of an Abstract of Title. *Et vide supra*, p. 414, n. (*a*).]

Restoration, to *Barnsley* v. *Powell*, in Lord Hardwicke's time, the Temporal Courts have refused to take cognizance of personal representation." The conclusive authority of the Spiritual Courts "is not peculiar to the case of marriage; it is the same in other instances where they have the jurisdiction; it is so in the probate of wills, it is so in the granting of letters of administration; if a will is forged, if a will is fraudulently obtained, of a personal estate, of which the Ecclesiastical Court has the jurisdiction; if that Court has granted a probate, it is not open to a Court of Common Law, it is not open to a Court of Equity, to enter into the fraud made use of in obtaining the will, or to the forgery committed upon a testator." An executrix brought an action against a debtor to the estate of her late husband, and upon the trial produced the probate of his will, in evidence. The defendant insisted the will was forged; and the Chief Justice, before whom it was tried, was of opinion he could not give such evidence directly against the seal of the Ordinary, in any thing within his jurisdiction; upon which a case was made for the opinion of the Court; and the Court held that the Chief Justicehad done right, and that no such evidence ought to be given, till the probate was repealed: they might, indeed, by proving the seal of the Ordinary forged, have relief; but if the seal of the Ordinary was genuine, then whatever forgery or fraud was committed, it was not open to the examination of a Common Law Court. (*a*) The same doctrine is to be found in the case of *Bransby* v. *Kerrick*, which was determined by the House of Lords. It was stated in that case that one Robert Bransby, the complainant's son, by his will, gave all his real and personal estate to the defendant Kerrick, and made him his executor; and that Kerrick duly proved. Afterwards, in a contest in the Ecclesiastical Court, touching the validity of that will, a sentence was given in favour of it. Bransby, the father, filed a bill in Chancery to set aside the will for fraud

conclusive.

[337]

Probate of a forgery of a Will.

Forgery of a Probate of a Will.

(*a*) Noel *v.* Wells, 1 Lev. 235. But in one case of forgery, the will was treated as waste paper, and the probate was not recalled; 1 Leach, 117.

[The distinction is between the forgery of a probate copy of a will, and probate copy of a forgery of a will.]

and imposition. Witnesses were examined, and many acts and
[338] circumstances of imposition were proved. Lord Macclesfield, struck with the monstrous fraud and iniquity of the transaction, declared the executor should stand as trustee for the next of kin. Upon appeal, the House of Lords reversed the decree; on the ground, that it was "not competent, to a Court of Equity, to examine into fraud and imposition, in a will touching personal estate; that the Court of ecclesiastical jurisdiction had decided that point; that it was no longer open to discussion."(*a*)

Such Sentences not collateral evidence;

But a sentence, however conclusive on the point which it decides, is not evidence to prove collaterally something further, which is to be inferred from it. Letters of administration, granted to a relation were not admissible, to show the improbability of the intestate's having been lawfully married to the plaintiff, a few days before her death. (*b*) Neither are letters of administration any proof that the person for whose estate they were granted, was actually dead at the time. (*c*) Although no one can dispute the decision of the Court, or its effects; yet the adverse party may give in evidence that the [alleged] probate is, [in fact,] forged, because such evidence supposes that the spiritual Court has given no judgment; (*d*) and so there no reason for the temporal Court to be concluded by it; or the adverse party may prove, to invalidate the probate of an inferior Court, that the testator left *bona notabilia* elsewhere; for then such Court had no jurisdiction. (*e*)

of marriage,

or death.

(*a*) Duchess of Kingston's case, 20 Howell's St. Tr. 398, 449.

[The Prerogative Court having admitted testamentary papers to probate, as a will and codicil, is conclusive evidence, upon their being distinct instruments; Russell *v.* Dickson, 1 Con. & Law. 284.

That probate is not conclusive evidence to all intents and purposes, even if genuine and valid, see Andrews *v.* Powys, 2 Bro. P. C. 504: where, although a will had been proved in the Ecclesiastical Court, yet an executor of a former will brought his bill in Equity, to discover by what means the latter was obtained, &c., and for an account; and a demurrer to the jurisdiction was overruled.

Executor proved a will of personal estate, wherein one of the legacies is forged, he has no remedy in Equity; but ought to have proved the will with a special reservation as to that legacy; Plume *v.* Beale, 1 P. Wms. 388.

Probate copy of a will not evidence as to lands, even if the original lost; Doe d. Ash *v.* Calvert, 2 Camp. 389.

Probate copy of a will is conclusive evidence, of the sanity of the testator, and his competency to dispose of his personal estate; but by no means of the like, as to his real estate; Hume *v.* Burton, 1 Ridg. P. C. 277.]

(*b*) Blackham's case, 1 Salk. 290.

(*c*) Thompson *v.* Donaldson, 3 Esp. 63. [Nor Probate, *vide supra*, p. 442, n. (*c*). Nor upon the question of who is next of kin; Barrs *v.* Jackson, 1 Yo. & C. 585.]

(*d*) [*Vide supra*, p. 443, n. (*a*)].

(*e*) Bull. N. P. 246.

Sentences of the Courts of Admiralty;

To the decision of Admiralty Courts, either in this country or in others, upon questions of prize, a like conclusive authority has been conceded; for they are founded on the law of nations, and public faith is concerned in keeping them inviolate. "It is quite clear," (are the words of Sir W. Grant,) "that from the time of Lord Hale to the present period, it has been settled that a sentence of condemnation, in a Court of Admiralty, is conclusive." (*a*)

how far such conclusive.

When it mentions the ground on which it proceeds, it is conclusive evidence of the facts, which it professes to decide. (*b*) If the ground be not stated in the sentence, it will be presumed to have been that the ship was the property of an enemy; (*c*) but it will be open to the adverse party to show, that it proceeded on some other ground. (*d*) If the sentence itself professes to have been made on particular grounds, and sets them forth, and they appear not to warrant the condemnation, then the sentence is not conclusive as to those facts (*e*) And they must be distinctly stated: Lord Ellenborough said he would not fish for a meaning; and that it was by an over-strained comity that foreign sentences were received, as conclusive evidence of the facts, which they positively aver. (*f*)

[339]

Ld. Ellenborough's remarks.

Appeal.

The only appeal against a foreign sentence is to the King in Council; who may grant letters of marque and reprisal. (*g*)

Court sitting in a neutral country.

The sentence of a Court of Admiralty, sitting under a commission from a belligerent power, in a neutral country, will not be recognised in our Courts; and that is to be considered a neutral country for this purpose, in which the forms of an independent central government are preserved, although the belligerent may have such a body of troops stationed there, as in reality to possess the sovereign authority. (*h*)

(*a*) Kindersley *v.* Chase, Park on Ins. 486; where several other cases were collected.

(*b*) Lothian *v.* Henderson, 3 B. & P. 499. But only of those, Christie *v.* Secretan, 8 T. R. 192.

(*c*) Le Blanc, J., in Pollard *v.* Bell, 8 T. R. 434.

(*d*) Kindersley *v.* Chase, Park on Ins. 490.

(*e*) Le Blanc, J., in Pollard *v.* Bell, 8 T. R. 434.

(*f*) In Fisher *v.* Ogle, 1 Camp. 418, he spoke strongly of the piratical way in which some of the French Courts at that time had proceeded: and in another case he said that, like Lord Thurlow, he should die in the belief, that the sentences of foreign Admiralty Courts ought never to have been admitted; Donaldson *v.* Thompson, 1 Camp. 429; Bolton *v.* Gladstone, 5 East, 155.

(*g*) Hughes *v.* Cornelius, 2 Show. 242.

(*h*) Donaldson *v.* Thompson, 1 Camp. 429. [As to Evidence on Marine affairs,

Sentences of Foreign Courts conclusive.

It may now be considered as decided, that the judgments of other Foreign Courts are to be held conclusive; indeed, it is absurd on principle, that, as Lord Ellenborough said, "the Judges here should try a writ of error upon the proceedings in a Court abroad."(*a*) The question was brought before the Vice Chancellor (Sir L. Shadwell), (*b*) in this shape, "whether, where a judgment has been recovered in a Foreign Court, and an action is brought upon that judgment in one of the Courts of this country, this Court will entertain a bill for a discovery, and a commission to examine witnesses abroad, in order that their evidence may be used, in the action in Westminster Hall, on the foreign judgment,"—and after an elaborate investigation of the conflicting authorities, he decided it, by allowing a demurrer to the bill; saying that the old authors (*c*), and the opinions of Lords Ellenborough (*d*) and Kenyon (*e*), greatly overweighed the proposition to be extracted from the judgment of Lord Mansfield (*f*), and the expression of opinion by Mr. Justice Buller (*g*)." But foreign decisions are disregarded if they contain on the face of the proceedings any thing contrary to reason and justice; or any material defect: as where the defendant, not being resident within the jurisdiction of the Foreign Court, was neither served with process, nor came in to defend the action; (*h*) and where the defendant had been ordered to pay a certain sum of money to the plaintiff,

[340]

Sir L. Shadwell's decision, in *Martin* v. *Nicholls*.

But some such are disregarded.

see an Essay by Mr. Van Heythuysen. In the Admiralty Courts, the general rule, as to the use of the ship's log-book, in evidence, is—to receive it with jealousy where it makes for the parties, as it may have been manufactured for the purpose,—but as the best kind of evidence when against them; Eleanor Hall, 1 Edwards, 163. In another case, it was held, the log-book of one suing in that Court, could never be made evidence for him; Sociedade Feliz, 1 W. Rob. 311. The log-book of another vessel, in company, was rejected by the Admiralty Court, in Zepherina Lima, 2 Hagg. 318, and see Le Niernen Dupotet, 1 Dodson, 9; but then an objection of interest arose; and it was prior to the statute. But that the log-book (like other admissions) is admissible in evidence against the person who wrote it, as in the case of a mate suing for his wages in the Admiralty Court, see Malta, Young, 2 Hagg. 158, note.]

(*a*) Tarleton *v.* Tarleton, 4 M. & S. 20.

(*b*) Martin *v.* Nicolls, 3 Sim. 461. Mr. Starkie gives the same opinion after a review of the authorities, 1 Stark. on Ev. 228.

(*c*) Gold *v.* Canham, and Cottington *v.* Cottington, 2 Swanst. 325, note.

(*d*) Tarleton *v.* Tarleton, 4 M. & S. 20.

(*e*) Galbraith *v.* Neville, 1 Doug. 6, note.

(*f*) Walker *v.* Witter, 1 Doug. 1.

(*g*) Galbraith *v.* Neville, 1 Doug. 6, note.

(*h*) Buchanan *v.* Rucker, 1 Camp. 63.

on a certain day, first deducting thereout the defendant's costs to be taxed by the proper officer; but the defendant's costs had not been taxed. (*a*) And when the party who claims the benefit of the foreign judgment, applies to our Courts to enforce it, then its merits are examined. "When it is thus voluntarily submitted to our jurisdiction," (says Mr. Justice Eyre,) "we treat it, not as an obligatory, to the extent to which it would be obligatory, perhaps, in the country in which it was pronounced; nor as obligatory to the extent to which, by our law, sentences and judgments are obligatory; not as conclusive, but as matter *in pais*, as consideration *primâ facie* sufficient to raise a promise. We examine it as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law." (*b*) A foreign law is proved as a fact: (*c*) if written, by a copy properly authenticated; (*d*) if unwritten, by the testimony of persons competent to say what it is. (*e*) Lord Stowell, in *Dalrymple* v. *Dalrymple*, referred to three classes of authorities, "the opinions of learned professors, given in the present or similar cases;—the opinions of eminent writers, as delivered in books of great legal credit and weight;—and the certified adjudications of the tribunals, upon such subjects." (*f*)

And when open to examination,

how examined.

[341]

Foreign Law to be proved as a fact.

Lord Stowell's dictum in *Dalrymple* v. *Dalrymple*.

An ingenious difficulty has been started, "Would foreign lawyers be permitted to give testimony that a decision made in their country, by Judges having competent jurisdiction, was not agreeable to the law of such country?" (*g*) Doubtless there are, in other countries, as in this, Judges, whose expositions of the law would outweigh the accumulated opinions of many professors; and whose judgments can make that to be [taken for] law,

Evidence as to such Foreign Law.

(*a*) Sadler *v.* Robins, 1 Camp. 253.

(*b*) Phillips *v.* Hunter, 2 H. Black. 410, [and S. P., *vide supra*, p. 425.]

(*c*) [*Ex parte* Cridland, 3 V. & B. 99. But an affidavit verifying proceedings at law is not evidence; such an one ordered to be taken off the file with costs; *Ex parte* Barnes, Mont. & M. 9.]

(*d*) [An exemplification of a sentence of a Court in Holland, under the common seal of the States, may be read in evidence, in a suit in Chancery; Anon. 9 Mod. 66. A decree at Leghorn was used, in Barrow *v.* Jamenean, Dick. 48.]

(*e*) [As in the case of Nelson *v.* Bronté, at the Rolls, in 1845.]

(*f*) 2 Hagg. 81.

(*g*) See a note in the Duchess of Kingston's case, 20 Howell's St. Tr. 469. [*Semble*, in effect they might; by giving evidence of what was the law.]

for the future, which was not so before; but there are others to whose decisions so much deference would not be paid. It is not a sound objection; and in practice the opinions of foreign lawyers are constantly obtained. (*a*) The Court of the King's Bench avoided giving an opinion, as to the admissibility of an opinion, on the Russian law, given at the command of the Emperor, by the Judges of the Custom-house Court of St. Petersburgh, authenticated by their signatures and seal. (*b*)

Opinions of Judges of Foreign Courts.

(*a*) For instance in Middleton *v.* Janserin, 2 Hagg. 443; [and in Nelson *v.* Bronte, *ut supra.*]

(*b*) Bohtlingk *v.* Inglis, 3 East, 386, 399.

CHAPTER II. [342]

WHERE THE COURT RESORTS TO INSPECTION IN AID OF PROOF.

THERE was an ancient form of trial called Trial by Inspection or Examination, in which the Judges determined a point in question, upon the direct testimony of their own senses. Lord Coke gives a simple instance of it;—"If the plaintiff makes attorney in Court, and the defendant pleads that the plaintiff is dead, and one appears and says he is the plaintiff, which is denied by the other party, the Justices shall adjudge if he who now appears be the same person who before made an attorney in Court." (*a*) It was sometimes resorted to also in a case of maim. Sir William Blackstone speaks of it thus:— "Trial by inspection, or examination, is when for the greater expedition of a cause in some point or issue, being either the principal question or arising collaterally out of it, but being evidently the object of sense, the Judges of the Court, upon the testimony of their own senses, shall decide the point in dispute. For where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it; who are properly called in to inform the conscience of the Court in respect of *dubious* facts.—As in case of a suit to reverse a fine for nonage of the cognizor, or to set aside a statute or recognizance entered into by an infant; here, and in other cases of the like sort, a writ shall issue to the sheriff, commanding him that he constrain the said party to appear, "*ut per aspectum corporis sui constare poterit justiciariis nostris, si prædictus A. sit plenæ ætatis necne.*" (*b*)

Trial by inspection;

—identity,

—maim,

—other objects of sense,

—nonage,

(*a*) 9 Rep. 30.

(*b*) In that trial, however, if the Court was not satisfied, it proceeded to the *voire dire*, witnesses, &c.

[343]
—idiocy.

Similar to this was the right of a person who had been found an idiot, *a nativitate*, to "come in person into Chancery before the Chancellor, and pray that before him and such justices or sages of the law as he shall call to him, (and which are called the King's Counsel,) he may be examined if he be idiot or not: or his friends may sue a writ out of the Chancery to bring him into the Chancery, *ibid' cor' nob' et consilio nostro examinand.*" (*a*)

Inspection in equity suits.

This mode of decision may now be considered obsolete at common law, but an Equity Judge exercises in certain cases a very similar power. Sometimes, indeed, it is directly given to him by statute. (*b*) He, however, combines with that power another and far more extensive discretion of ascertaining facts for himself with his own eyes, for having the duties of a Jury also to perform, he must constantly endeavour to follow up the truth by watching all that passes and inspecting what is laid before him.

The experience of a single circuit will furnish a hundred instances of the effect, (far greater than any speech or written evidence could raise,) produced upon a jury by matters which pass during the trial, "*oculis subjecta fidelibus.*" A witness describes a mark upon a stolen article which has not been in his possession since the day he lost it; the jury discover the mark, and their minds are instantly made up as to the verdict. A stolen animal is seen to recognise his real owner, and the circumstance has on the jury all the effect of demonstration. The different nature of the litigation in equity prevents our finding any thing exactly parallel; but circumstances will often occur at the hearing, which carry to the mind of a Judge confirmation of a fact. For instance, an impeached document, a letter, had been alleged to refer to the fall of the tower of Fonthill, the opposing counsel asserted that the date was earlier, and having unsuccessfully urged Lord Cottenham (then Master of the Rolls) to take judicial notice of that event, as a matter of history, they applied for an inquiry to be

(*a*) 9 Co. Rep. 31.
(*b*) As the stat. 9 Anne, c. 18, which enables him to call on guardians to produce minors in Court, &c.

directed to fix its date; the counsel, on the other side, strenuously refused to admit the date, and opposed the inquiry, but the discussion appeared to have impressed the fact on the mind of the Court, quite sufficiently for all purposes. (*a*) [234]

But to pass on to matters which fall more strictly under the head of inspection, a Judge sitting in equity will often require to have things brought before his eyes, either publicly or in his private room. Thus he will order an infant to be produced in Court, to see that he is living, and still a child. (*b*) He will examine a document, which is charged to have been forged; and if that fact should be proved so clearly as to leave no rational doubt upon his mind, he will cancel it as a forgery, without the intervention of a jury. Yet where the defendant and a witness have both sworn to the execution, the Court will not make a decree without first directing an issue. (*c*)

Examination of document impeached.

But in point of fact every document, although no suspicion of forgery has been cast upon it, is liable to be inspected by the Judge; whether for the purpose of satisfying himself of its genuineness and validity, or of informing himself fully of its contents.

All documents subject to inspection by the Judge.

With regard to these purposes, Lord Coke, speaking of deeds, and the necessity of showing them to the Court, says, "To every deed, two things are requisite and necessary; the one that it be sufficient in law, and that is called the legal part, because the judgment of *that* belongs to the Judges of the law; the other concerns matter of fact, *sc.* if it be sealed and delivered as a deed, and the trial thereof belongs to the country. And therefore every deed ought to approve itself, and to be

1. To ascertain the genuineness.

(*a*) In Trezevant *v.* Fraser, Rolls, Jan. 1836, MS.

(*b*) Perhaps there is no instance of his scrutinizing for his own satisfaction an alleged similarity of features; but that was relied upon by Lord Mansfield in the celebrated Douglas cause, as evidence of paternity; see Paris and Fonblanque on Medical Jurisprudence, Vol. 1, p. 220. This is a frail test; but there are often bodily peculiarities which run in families, and which might, immediately they were seen, be conclusive. In the case of Morris *v.* Davies, evidence was given of a resemblance between a miniature of the alleged adulterer given to the mother, and the youth whose legitimacy was in question. See Nicholas on Adulterine Bastardy, p. 217.

(*c*) Peake *v.* Highfield, 1 Russ. 559; and see the cases on this subject collected there. [And the principle adverted to by C. B. Gilbert, *supra*, p. 5, n. (*b*), 2, that by the verdict of a jury the credibility of an Englishman is to be tried, when impugned or doubted.]

[345]

Deeds.

proved by others: approve itself, upon its showing forth to the Court, in two manners. 1. As to the composition of the words, to be sufficient in law; and the Court shall judge that. 2. That it be not razed or interlined, in material points or places; and upon that also, in ancient time, the Judges did judge, upon their view, the deed to be void; but of late times the Judges have left that to be tried by the jury, *sc.* if the razing or interlining was before the delivery. (*a*) 3. That it may appear to the Court and to the party, if it was upon condition, limitation, or with power of revocation," &c. (*b*). Lord C. B. Gilbert observes, upon this, that a razed or interlined deed was anciently adjudged void;—" because it did not certainly appear to the Court whether the mind of the party was contained in such a mangled contract or not:' but as the manner of conveyancing swelled from the short title deeds to large and voluminous ones, so vast room was left to the misprisions of the clerks, that must be altered or amended, or with great labour and expense of time written over again, that they thought it necessary not to discharge the deed upon the demurrer, but referred it to the jury." (*c*) It then became customary to examine into the really essential fact, whether the alteration was so material as to discredit the instrument. (*d*) But still one technical rule remained, that if the alteration had been made by one of the parties, the deed was considered void as against that party. (*e*)

Documents injured in Court.

If a document becomes obliterated or injured, or if the seal happens to be detached from it, during the time when it is considered to be in the custody of the Court, the Court will do all that lies in its power to prevent the party from suffering. It is the same with a deed pleaded with *profert* at common law. Lord Coke says, " If a deed be showed in Court, or in

(*a*) In a Court of Equity, interlineation will be presumed, to have been before the delivery; Fitzgerald *v.* Fauconberg Lord, Fitzgib. 214; Trowell *v* Castle, 1 Keb. 22.

(*b*) Leyfield's case, 10 Co. Rep. 92. The circumstances under which a deed will be declared void are set forth minutely in Sheppard's Touchstone, 63 & 68. [And further as to proof of Deeds, *vide supra*, p. 176, *et seq.*]

(*c*) Gilb. on Ev. 106.

(*d*) [As to obliteration, interlineation, or other alteration made in any will executed since the year 1837, see stat. 7 Wm. 4, and 1 Vict. c. 26, s. 21, *at supra*, p. 182-3.]

(*e*) See Pigot's case, 11 Co. Rep. 27.

the custody of the Court, and by mischance the seal is broken off, the Court shall enrol the deed in Court for the avail of the party;" (*a*) C. B. Gilbert adds to this, "because when any thing is impaired under the custody of the law, it shall be restored by the benignity of the law as far as possible." (*b*) It has been mentioned above, that if the Judge observes an instrument not to have been properly stamped, he cannot admit it as evidence; but that he will often, rather than stop the cause, receive it on an undertaking of the party to get the defect remedied. (*c*) [346]

Document wanting Stamp.

In all these cases it is the duty of the Registrar to assist the Court in its inspection of documents, and to point out any thing that appears faulty or irregular. (*d*)

The admissibility of ancient papers, books, &c., can often be determined upon by nothing short of a careful inspection. For instance, on a motion in the King's Bench for a new trial; after the Court had decided that certain ancient Rentals, from the muniments of the Dean and Chapter of Exeter, could not be proved to be genuine by the similarity in form of modern rentals, Lord Ellenborough continued, "But inasmuch as upon inspection of the original ancient books, we think they do contain very strong internal evidence of their actually being receivers' books, the language of several entries importing that one *Nicholas Webber* was therein accounting to the Dean and Chapter, for money paid to himself, and with the receipt of which he therein debits himself, such as "*solvit mihi*,"—"*solvit per me*:" We are of opinion that it is fit that a new trial should be granted, for the purpose of submitting the quality and character of these books, and the question of their admissibility, as receivers' books, again to the consideration of the Judge, upon a further inspection of the contents of the same." (*e*) [And by nothing short of a careful inspection, can the genuineness of Registers be ascertained.]

Ancient documents.

Registers.

(*a*) 2 Inst. 676.

(*b*) Gilb. on Ev. 111. [See (*inter alia*) an Order of 5 Car. 1, 1629, to enrol certain letters patent; the Privy Seal having been burnt, at the fire in the Six Clerks' Office. Sand. Ord. 161.]

(*c*) [As to Stamps, *vide supra*, p. 391.]

(*d*) As to Exhibits, *vide supra*, p. 146, *et seq.*: as to proof of such, at the hearing, *vide supra*, p. 188, *et seq.* As to the course when such are suspected to be forged, *vide supra*, p. 192-3.]

(*e*) Doe d. Webber *v.* G. Thynne, Lord, 10 East, 206.

2. To ascertain the contents.

With respect to the other purpose for which the Court will inspect a document, namely, that of fully and perfectly ascertaining its contents, it does not occur that any thing requires to be said. The Judge will give such directions as
[347] he thinks necessary, for extracts, or copies, or originals, or facsimiles, or translations, to be sent to him, and it is highly proper that his convenience should be primarily attended to.

Injunction cases.

The cases, however, in which this power of the Court is most actively called into operation, are those in which an injunction is applied for, or other proceedings are taken, on an allegation of Piracy, or of the infringement of a Patent.

Piracy of copyright.

Sometimes a Judge will be satisfied with little more than a glance: as in the case of *Butterworth* v. *Robinson;* where the defendant, having published an abridgment of the Term Reports, "a copy of the work was handed up to the Lord Chancellor" (Roslyn). He said, "I have looked at one or two of the cases with which I am pretty well acquainted, and it appears to me an extremely illiberal publication; take the injunction." (*a*) But when such demands are made upon his time and his faculties, as to compare critically with the original, a work which professes to be a fair abridgment,—or to collate two contending works with some literary predecessor,—to examine whether a print is *bonâ fide* taken from a painting, or is a servile copy of another engraving,—or even to catch the fleeting identity of a tune,—these are obviously duties which he will best perform in his retirement. It is the usual practice to refer them to the Master, or to some other competent person, to report upon, but for these purposes the Master or referee must be considered as representing the Court. Thus, in *Gyles* v. *Wilcox*, (*b*) where an injunction was prayed to stay the printing of a book called Modern Crown Law, as being borrowed from Sir Matthew Hale's Pleas of the Crown, Lord Hardwicke refused to compare them himself, or to send it to a jury; because it would be absurd for the Chief Justice to sit and hear both books read over; but he referred it to

(*a*) 5 Ves. 709. See Mathewson *v.* Stockdale, 12 Ves. 270, and the cases cited there.

(*b*) 2 Atk. 141. For references to the Master, see Carnan *v.* Bowles, 2 B. C. C. 80; —— *v.* Leadbitter, 4 Ves. 681.

"two persons of learning and abilities in the profession of the law, who would accurately and carefully compare them, and report their opinion to the Court." In *Mawman* v. *Tegg*, (*a*) Lord Eldon, having observed that the quantity of a work [348] pirated was "a matter which could not be tried by the eye of the Judge," made a very special order; referring it first to the Master to ascertain the quantity, and then to a jury to decide upon the title, but with an offer to send both questions at once to the jury. In another case (*b*) for piracy of patterns used in printing cottons, "the Lord Chancellor (Lyndhurst) observed, that as this was a case capable of inspection, the Court would exercise a *primâ facie* judgment upon it, without referring the question, as was usually done, to the Master. Some of the patterns were accordingly handed up to his Lordship, and were pronounced to be very much alike; some slight differences were also pointed out." In the judgment, he said, "That pattern has been produced to the Court; and, on inspection and comparison of it with the other, I can perceive no difference, or a difference so slight as to be colourable only."

Infringement of patents.

The practice of the Court when a Patent is applied for, or is alleged to have been infringed, is precisely similar to that in the cases of copyrights. In *ex parte Fox*, (*c*) an opposed petition for a patent, in respect of an improvement in steam-engines, Lord Eldon said, "I will read the affidavits, and see the parties and their models." (*d*) It may be observed, that in many of these questions the scientific knowledge of the Judge is put to the test: and that in some, such as the identity of medicines, it cannot be expected that he should do more than satisfy himself, as well as he can, from the information of others.

(*a*) 2 Russ. 385.
(*b*) Sheriff *v.* Coates, 1 Russ. & M. 159.
(*c*) 1 V. & B. 67.
(*d*) [As to proof of such as Exhibits, *vide supra*, p. 146, n. (*a*), *et* p. 172, n. (*f*)].

[349]

CHAPTER III.

EFFECT OF THE ADMISSIONS, AND OF THE EXAMINATIONS.

Our subject, as we are treating it in the present part of the work, would now require some observations on the effect which admissions and evidence in general, will ordinarily produce on the mind of the Court. But these topics have been, of necessity, so frequently touched upon throughout the preceding pages that they may be passed over cursorily here.

Admissions.

With respect to Admissions, (*a*) there is one important particular, in which they differ from every other kind of proof; namely, that the Court will eagerly lay hold of an admission, and act upon it as truth, without inquiring whether it be really so, or not. (*b*) The reason is, that truth is sought by the Judge, not, as in some sciences, for its own sake in the abstract, but as the means of solving his problem; namely, the deciding the case before him, without injury to the general administration of justice. Therefore, an admission, (for the consequences of which the party has himself alone to blame,) serves like a formula in algebra, and leads the Judge to his end with less expense of time and trouble. Lord Hardwicke said, "As to matters of fact, an admission by a party concerned, and who is most likely to know, is stronger than if it had been determined by a jury; and facts are as properly concluded by admission as by a trial; (*c*)—if this Court were not to conclude on such

(*a*) [As to Admissions, *vide supra*, p. 9, *et seq.*]

(*b*) [Of admissions of conclusions of law, evidence must be put in issue, whether made by writing or otherwise; of admissions of matters of fact, it is otherwise; Fitzgerald *v.* Fitzgerald, 1 Mon. 358; *et vide supra*, p. 230, n. (*a*). Letters of the plaintiff, in the hands of the defendant, may be proved and used as evidence of facts, although not as naked admissions, without being put in issue; Houlditch *v.* Donegal, M. of, 1 Mod. 364.]

(*c*) [So at law, a parol admission of a party, is always receivable in evidence against him; although it relates to the contents of a deed, or other written instrument; Slatting *v.* Pooley, 6 M. & W. 664; Newhall *v.* Holt, 6 M. & W. 662.]

admissions, there would be no end of causes here, where there is no jury at the bar."(*a*) Sir D. Evans, however, complains, with justice, of the practical inconvenience arising from the extent to which this has been carried;—"It has generally appeared to me that there is a very strong disposition to hold parties to the consequences of every thing which can even, by implication, be regarded as an acknowledgment; without giving an adequate attention to the nature of the act, from which such acknowledgment is inferred, to the difference between consciousness and inadvertence, between acquiescence on the ground of immateriality or insignificance, and assent induced by a certain persuasion of the truth."(*b*)

Observations of Sir D. Evans.

[350]

It has been mentioned before, that admissions which have been deliberately made for the purposes of the suit, whether in the pleadings, or by agreement, will act as an estoppel to the admission of any evidence contradicting them. (*c*) This includes strictly, down to every word and figure, any document that is by reference incorporated in the bill or answer,—a schedule, a will or deed, an account book, even the answer of another defendant. (*d*) But the Court will always measure the extent of an admission very carefully. Thus, where an answer merely speaks of a deed, as being in the possession of the defendant, he is barred only—from disputing its existence,—and his power to produce it. Without, however, being made a part of the proceedings, documents may be so spoken of as to preclude the parties from impugning their validity. Where the

Admissions made for the purpose of the suit;

(*a*) [In the Ecclesiastical Courts, even, in suits criminal, acknowledgment of the party defendant, is evidence against him; Woods *v.* Woods, 2 Curt. 521. So in the Court of Admiralty, a formal admission of fact, (by the seizor, for example,) is conclusive; Matchless, Vint, 1 Hagg. 98. And confession, or admission, of the charter of a vessel, held admissible, in a collision case; Manchester *v.* Macleod, 1 W. Rob. 62.]

(*b*) Appendix to Pothier, p. 320. [Acknowledgment in writing against the interest of the party, is, of course, equal to strong evidence; and in the Court of Admiralty, such held to be of great weight: but there, however, it may be impeached, on the ground of collusion or intimidation; San Jose De Lota, 6 C. Rob. 249. It seems hardly necessary to add, that, from the nature of things, a like rule prevails in the Courts of Equity.]

(*c*) [*Supra*, p. 11. At law, at nisi prius, where admissions had been made previous to a former trial; held, that they were revivable on a new trial, notwithstanding a notice to the opposite party, that no admissions would be made; Doe d. Wethercll *v.* Bird, 7 C. & P. 6.]

(*d*) Monk *v.* Sibbald, 2 V. & B. 376; Anon. 1 P. Wms. 100; Bennett *v.* Walker, Dick. 130; Powell *v.* Lassalette, Jac. 550.

answer disputed the construction of a deed, the Court refused to hear evidence that its execution had been procured by fraud. (*a*) So, where in answer to a bill for the arrears of an annuity, one defendant denied that he had received the whole consideration money, the other, a trustee in possession of the land on which it was charged, alleged that the rents were insufficient to keep it down, they were neither of them permitted to take advantage of a defect in the enrolment. (*b*)

by counsel;

[351]

For the purposes of the suit, an admission made by Counsel is conclusive; and in subsequent proceedings, or on a rehearing, if the Court is satisfied that they were really made, they cannot be retracted. The party's remedy is against his counsel. (*c*) As, however, they are usually proved, by no more satisfactory testimony than the memory of the adverse counsel, or the notes which he has made upon the back of his brief, (*d*) their exact force and form are constant subjects of dispute. In a case at common law, Lord C. J. Best seems to have thought, that on a new trial, the admissions of the counsel at the former one, could not be proved, unless the party was himself in Court; because the counsel was not the party's *agent:* Mr. J. Burrough said, "parties are every day bound by the acts and declarations of their counsel; if the plaintiff was in Court, heard what his counsel said, and made no objection, I think he was bound." (*e*) In one case, Mr. Bickersteth, [now Lord Langdale, M. R.,] having said, "The Bench, at the Quarter Sessions, recommended a settlement of the disputes and differences between the parties. An arrangement was accordingly made, and reduced into writing, and signed by counsel, and it is sworn that the defendant was present: we have only to prove that he consented." Sir J. Leach, M. R., interposed, "You have not so much to do; for it being proved to have

(*a*) Blake *v.* Marvell, 3 B. & B. 47.

(*b*) Dunn *v.* Calcraft, 2 S. & S. 56; and Moselay *v.* Taylor, there cited. *Vide supra*, p. 22.

(*c*) Lord Hardwicke in Bradish *v.* Gee, Ambl. 229.

(*d*) [Notes on the back of the brief of counsel, in an action at law used in a suit in equity; see Catell *v.* Corall 3 Yo. & C. 413.]

(*e*) Colledge *v.* Horn, 3 Bing. 122. It may be observed here, that Acquiescence is in many instances equivalent to Admission. It is received every day to prove against a prisoner, something that has passed in his presence, affecting his character, or conduct, and unrepelled by him.

been signed by counsel on both sides, it is for the defendant to disprove it." Mr. Knight, [now V. C. Sir J. Knight Bruce,] arguing *contra*, the M. R. said,—"The only question is, whether the counsel had sufficient authority? In the absence of evidence, a Court will conclude that he had authority; for it is not to be presumed that counsel would enter into an agreement without authority." (*a*)

Court will presume that counsel had authority.

It may be observed here that Acquiescence is in very many instances equivalent to Admission, (*b*) it is received every day to prove against a prisoner some thing that has passed in his presence affecting his character or conduct, and unrepelled by him.

Acquiescence, how far an Admission.

[352]

Admissions of particular articles before an arbitrator are good evidence; because, (as Mr. Justice Buller says,) they are not made with a view to a compromise, (*c*) but the parties are contesting their different rights as much as they could do on a trial. (*d*)

Admissions before an arbitrator.

From the facts thus admitted, other facts may, of course, be inferred; and when the latter are so necessarily connected with the former, that, if disproved, they will neutralize the admissions, the defendant is not allowed to bring evidence to disprove them. Thus if the answer admit a woman to be the widow of an individual named, his marriage and his death are necessary inferences, which the defendant would be precluded from calling in question. And it will be the same, although the fact to be inferred should be expressly denied. Thus where the case, set forth in the answer, showed that the plaintiff had an interest; the defendant was ordered to pay money into Court, on the strength of that admission, although the answer contained a direct denial of the interest. (*e*) The answer to a bill for the specific performance of a parol agreement, to grant a lease, and for an injunction, to restrain an ejectment, admitted that when the defendant had let the plaintiff into possession

Necessary inferences from facts admitted.

(*a*) Elworthy *v.* Bird, 1 Tamlyn's Rep. 43.

(*b*) [But merely not objecting, is not, in every case, such an acquiescence as to have this effect; see Ess *v.* Truscott, 2 M. & W. 385.]

(*c*) [As to such admissions "without prejudice," *vide infra*, p. 466, n. (*b*).]

(*d*) Bull. N. P. 236, citing Westlake *v.* Collard.

(*e*) Domville *v.* Solly, 2 Russ. 372.

it was his expectation, and probably that of the plaintiff, that the holding would last as long as the alleged term, but that neither party was bound; the Court, however, upon this answer refused to dissolve the injunction. (*a*).

Admissions of an executor or administrator.

An admission of an executor or administrator is generally sufficient against the estate; (*b*) but where, in a suit by a creditor, the answer of the administrator stated that he believed the debt was due, Mr. Fonblanque, for the plaintiff, expressed a doubt whether that was a sufficient foundation for a decree; Lord Eldon was inclined to think it sufficient; but Mr. Richards (*amicus curiæ*) suggesting that it was doubtful, Mr. Fonblanque consented to exhibit an interrogatory. (*c*)

[353]

Admissions which have been acted upon.

Again, admissions, though not made for the purposes of the suit, are equally binding, if the adverse party have been induced to rely and to act upon them. Conveyancers depend on this principle, to a very great extent; admissions and statements of every kind, written in the margin of the abstract by the solicitor of the vendor, are trusted to, and acted upon, because, directly the deed is executed, they cannot be retracted. Yet from a misgiving of the little security that this really affords, the conveyancer has usually required these statements to be verified by voluntary affidavits, which, however binding on the conscience, are never recognised in Court as legal instruments. With reference to this practice the late act for the suppression of extra-judicial oaths contains the following clause, "And whereas it may be necessary and proper in many cases not herein specified, to require confirmation of written instruments, or allegations, or proof of debts, or of the execution of deeds or other matters; be it therefore further enacted,—That it shall and may be lawful for any justice of the peace, notary public, or other officer now by law authorized to

Voluntary affidavits.

Statutory declarations.

(*a*) Attwood *v.* Barham, 2 Russ. 186.

(*b*) [Declarations by a party to the record, although suing in a representative capacity, and made before he became such, have been held admissible, at law; Smith *v.* Morgan, 2 Mood. & R. 257.]

(*c*) Hill *v.* Binney, 6 Ves. 738. [What amounts to an admission of assets by an executor; see Holland *v.* Clark, 2 Yo. & C. 319. Payment of interest on a legacy, how far such; Att. Gen. *v.* Higham, 2 Yo. & C. 634. Admissions of testators and intestate, *vide infra*, p. 463; and Sons of the Clergy, Corp. of *v.* Swainson, 1 Ves. 75.]

administer an oath, to take and receive the declaration of any person, voluntarily making the same before him, in the form annexed: and if any declaration so made shall be false or untrue in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanor." "I A. B. do solemnly and sincerely declare, That —— and I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the provisions of an act made and passed in the 6th year of his present Majesty, intituled an Act, &c." (*a*)

Several cases which might be mentioned here belong more properly to the doctrine of estoppel. (*b*) For instance, where a person makes a lease, having no interest in the premises, but they afterwards descend to him, he is not allowed to dispute the lease. (*c*) Estoppels.

[354]

It is the same thing, when the person who made the admission, has been assisted by it to get something done which was an object to him, though possibly not advantageous. Thus where a person was imprisoned by a creditor, who afterwards took out a commission of bankruptcy against him, and proved the debt, and the bankrupt applied to the King's Bench and was discharged, he wished afterwards, in an action of trespass, to dispute the validity of his commission; but Lord C. J. Admissions by which an object has been gained.

(*a*) Stat. 5 & 6 Wm. 4, c. 62, s. 18.

(*b*) [An admission held to be binding as an adjudication upon a matter submitted to the Judge, when the order had been acted upon, and not stated to be by consent; Harrison *v.* Wright, 2 Dowl. & L. 695. As an instance of estoppel, by an admission by pleading at law, one which, however, seems to deserve insertion here, for its general relevancy to the subject of evidence, rather than to this part of the subject. In an action at law, against a witness, for not attending a trial, to give evidence; the declaration alleged, that the plaintiff had a good cause of action, in the original suit; (in which the defendant was to have been a witness,) and that the testimony of the defendant was to have been material evidence for the plaintiff. The defendant pleaded not guilty; and that the plaintiff could have proceeded to trial without the testimony of the defendant. At the trial, the plaintiff put in evidence the record in the original suit; for the purpose of proving its withdrawal, in consequence of the defendant's not being present as a witness; held, that the defendant was estopped, by his admission on these pleadings, (that the plaintiff had a good cause of action, in the original suit,) from reading the record so put in by the plaintiff, and from giving other evidence to shew, that in the original suit, the plaintiff had no cause of action, and, therefore, sustained no damage by his being obliged to withdraw the record; Needham *v.* Fraser, 14 Law J., N. S. C. P. 256, 9 Jur. 734.]

(*c*) Lord Hardwicke in Smith *v.* Low, 1 Atk. 489. The principle of the civil law is the same; "*Si alienum fundum vendideris, et tuum postea factum petas, hac te exceptione rectè repellendum.*"

Abbott said, "The question is, whether a party, having availed himself of the commission for one purpose, can afterwards be allowed to assert, to the same Judges before whom he took the benefit of the commission, that the commission was invalid. Lord Ellenborough gave his opinion to the contrary, and that has never since been questioned. I think his judgment was founded on good sense, and good law, and that we ought not to allow the plaintiff to say, in this Court, that he was not a bankrupt." (*a*)

Recitals in deeds, &c.

It is partly on this ground that a man is estopped, by law, from proving any thing contrary to what he has stated, or admitted in a solemn deed. Even the recitals are binding upon him. (*b*) Thus where the purchaser of an Equity of Redemption had the legal estate conveyed to him by a deed, dated August 1796, in which it was recited, that the purchaser had some time since paid to the mortgagee, the money due on the mortgage, and a bill to redeem was filed in January, 1816; it was held that the recital was an acknowledgment of the mortgage title, within twenty years. (*c*) In Ireland the recital in the release is always held to be sufficient evidence of the lease. (*d*)

(*a*) Watson *v.* Wace, 5 B. & C. 155. [Admissions of a debt made by a bankrupt, in his balance sheet and examination under his bankruptcy, (though not charging him so as to take the debt out of the Statute of Limitations,) are evidence of the character of advances, and whether loans or gifts; Courtenay *v.* Williams, 3 Hare, 539. Using an affidavit was held to make it admissible against the user, in another action at law, for some purposes; Prickell *v.* Hulse, 7 Ad. & El. 454.]

(*b*) A recital of a deed even, is said to be evidence against the grantor, without further proof of its execution, &c., though against other persons it is only secondary evidence; Gilb. on Ev. 100; Peake on Ev. 111, citing Ford *v.* Grey, 1 Salk. 286.

[Admissions by a recital of the execution of a will, see Bringlow *v.* Goodson, 5 Bing. N. C. 738, and S. C. 8 Sc. 71. Of the description of a person who signed a memorandum of agreement in writing, see Willington *v.* Browne, 9 Jur. 971, and see Berkley *v.* Bradley, 2 Dowl. & L. 586; 8 Sc. N. R. 843; Doe *v.* Coulthred, 2 Nev. & P. 165.

But description of parcels in a deed, as situate in a particular parish, being used in evidence between two parishes on a question of settlement, the other side was allowed to use parol evidence contradicting it; R. *v.* Wickham, 2 Ad. & El. 517. By stat. 6 & 7 Wm. 4, c. 20, s. 2, recitals in the new lease, (granted by ecclesiastical persons under the provisions of that act) of former lease, of deaths, &c., are to be conclusive evidence of the facts so far as regards the validity of the new lease.]

(*c*) Price *v.* Copner, 1 S. & S. 347; see further as to acknowledgments of mortgage, Hodle *v.* Healey, 6 Mod. 181: Rayner *v.* Oastler, 6 Mad. 274.

(*d*) Daly *v.* Kelly, 4 Dow. 435. [And now by stat. 4 & 5 Vict. c. 21, a release is made as effectual to pass freehold estates as a lease and release by the same parties; which act applies to England, and provides for cases of loss of leases prior to the act.]

Other admissions.

[355]

But where the party has neither derived any advantage, nor gained any object by his own admission or assertion; and no one of whom the Court has cognizance has acted upon it, or received any injury from it; then it is only taken as *primâ facie* proof, and evidence may be brought to rebut it. (*a*) For it would be too harsh a measure of justice if a person were to be visited with all the unexpected consequences which an idle, or even a depraved, falsehood might lead to, on the supposition of its being true. Far less ought unguarded expressions, made without any intention of deceiving, to place the speaker in a situation of irremediable disadvantage: as Lord Ellenborough said, in a settlement case, (*b*) "All the rated parishioners are considered as parties to the appeal, and, therefore, their declarations are evidence; but if what they have said is mere idle conversation, it will have but little weight." (*c*) Proof of the payment of rent is *primâ facie* evidence against the tenant of the landlord's title; proof of payment of tithes by the defendant (*d*) saves the parson the necessity of establishing his right, by evidence of presentation, institution, and induction. (*e*)

Idle, or unguarded, declarations.

Payment —of rent; —of tithes.

It must be remembered, however, that the Court takes cognizance of the general interests of the public; therefore, when a person has held himself out to the world in a particular character, he is precluded from denying it. Proof that the defendant has received tithes is, in an action for non-residence, decisive evidence against him that he is the parson. (*f*)

Receipt —of tithes.

A representative is bound by the admissions, as well as all other acts, of the person whom he represents. (*g*) And this

Admissions of a person represented;

(*a*) [See Doe *v.* Wainwright, 3 Nev. & P. 598; R. *v.* Wickham, *ut supra*.]

(*b*) R. *v.* Whitley Lower, 1 M. & S. 636; and see Rigg *v.* Curgenven, 2 Wils. 399.

(*c*) [In an indictment against a township, for non-repair of a bridge, evidence of declarations of inhabitants, being defendants on the record, admitted; as of admissions. *Per* Lord Denman, C. J., "If such inhabitants are surveyors of highways, and, on inquiry, by the attorney for the prosecution, have given details as to the liability and practice of the township, in respect of repairs; (evidence of) their statements is admissible, as of the communications of authorized official agents;" Reg. *v.* Adderbury East, 5 Q. B. 187; 1 Dav. & M. 324; 13 Law. J., N. S. 9.]

(*d*) [Payment of tithes by a parishioner is, as against him, *primâ facie* evidence of the rector's title; Chapman *v.* Beard, 3 Anst. 942.]

(*e*) Buller, J., in Berryman *v.* Wise, 4 T. R. 367; and see 3 T. R. 635; Radford *v.* Mackintosh, 3 T. R. 632.

(*f*) Bevan *v.* Williams, 3 T. R. 635, note.

(*g*) [As to admissions of executors and administrators, *vide supra*, p. 460. With regard to such as bind them as

includes all derivative interests, (*a*) such as those of the assignees of insolvents or bankrupts. (*b*)

those of an agent.

With respect to the Admissions of an Agent, Sir Wm. Grant expressed himself thus;—"An agent may, undoubtedly, within the scope of his authority, bind his principal, by his agreement; and, in many cases, by his acts. (*c*) What the agent has said, [356] may be what constitutes the agreement of the principal; or the representations, or statements, may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence may be admitted to prove that the agent did make that statement, or representation. The admis-

representing the testator or intestate the declarant, see Smith *v.* Smith, 3 Bing. N. C. 29; S. C. 3 Sc. 352.]

(*a*) [Where a lease had been surrendered, and was entirely at an end, and a new grant made; held, that any admission by the grantor, prior to such latter grant, respecting the subject granted, was evidence against the grantee, who claimed by title subsequent under the grantor; Crease *v.* Barrett, 1 Cr., M. & R. 919.

Where both parties claimed through a former owner, although only one claimed under him; held, that entries in the steward's books of such owner were admissible, against the former; Doe *v.* Seaton, 2 Ad. & El. 171, and S. C. 4 Nev. & M. 81. To render the declarations of *cestui que trust* admissible for a defendant, in an action by the trustees, the nature of the interest of the *cestui que trust* must appear, in order that may be seen that he is the party really and substantially suing; May *v.* Taylor, 6 Sc. N. R. 974; S. C. 6 Man. & Gr. 261. As to declarations of *cestui que trusts* being used against trustees, see also Doe *v.* Wainewright, 3 Nev. & R. 598.]

(*b*) [As to admissions of an insolvent, to be used against the assignees, see Thomas *v.* Connell, 4 Mees. & W. 267. With regard to a creditor's own admission, by an entry of payment in the books of the provost marshal of a colony, and how far conclusive, under the circumstances, see Fraser *v.* Birch, 3 Knapp, P. R. C. 380. Admissions, by one who had been a partner, made subsequently to the dissolution of partnership, of payment of a debt which had been owing to the firm, admissible against the other partners; Pritchard *v.* Draper, 1 Russ. & M. 191; S. C. 1 Tamlyn, 332. As to admissions by partners, see also Tunley *v.* Evans, 2 Dowl. & L. 747; 14 Law J., N. S. 116; 9 Jur. 428. Use of the answer in Chancery of a partner, as an admission, in an action at law, see Grant *v.* Grant, Peake N. P. 203.]

(*c*) [Where a collector was in the habit of collecting by a private book, in which he made ticks against the sums received; such was held admissible evidence against his sureties; although the parties who made the payments were still living, and might have been called; Middleton *v.* Melton, 5 M. & Ry. 264, and see the cases there collected. See also Lawrence *v.* Thatcher, 6 C. & P. 669. Entries in the books of the deceased attorney of a mortgagee, held admissible, to prove the payment of the whole mortgage money; Clark *v.* Wilmot, 1 Yo. & C. 53. Upon an assignment of perjury in an answer in Chancery by the defendant, it being material whether an annuity payable to the defendant or B. his trustee had been paid; held, that the clerk of B. might be asked—"at the time he received money from B. to pay in at his bankers, what did he say about the money?" held also, that the answer was receivable, as a declaration made by an agent, acting at the time within the scope of his authority; R. *v.* Hall, 8 C. & P. 358.

But of declarations not made in the course of acting as agent, evidence is not admissible against the principal: as where a son alleged to have acted as agent for his father, in the sale of a horse, had made declarations, to a stranger, and not in the business; Allen *v.* Denstone, 8 C. & P. 760.]

sion of an infant cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it. (*a*) But it is impossible to say, a man is precluded from questioning or contradicting any thing any person has asserted as to him, as to his conduct or his agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion. Lord Kenyon carried this so far, as to refuse to permit a letter by an agent to be read, to prove an agreement by the principal; holding that the agent himself must be examined. (*b*) If the agreement was contained in the letter, I should have thought it sufficient to have proved that that letter was written by the agent: but if the letter was offered as proof of the contents of a pre-existing agreement, then it was properly rejected." (*c*) Where the agency is not of such a nature as to be presumed, it must be directly proved, or a recognition of the act, or of the authority, must be shown. (*d*) It will not, however, be necessary for us here to enter into the rules of law relating to Principal and Agent.

—a party.

Agency must be proved.

An offer of a compromise, cannot be taken advantage of, and given in evidence as an admission. Mr. Justice Buller says,

Offer of a compromise no admission.

(*a*) [Nor is he allowed to offer evidence, to disprove what he has admitted by his answer; E. I. Co. *v.* Keighley, 4 Mad. 16, and see Watts *v.* Lyons, 7 Sc. N. S 1000.]

(*b*) Maesters *v.* Abram, 1 Esp. Rep. 375. [As to what evidence of agency is sufficient to render letters of the agent admissible, as admissions, in order to take a case out of the Statute of Limitations, see Whitehouse *v.* Abberley, 1 Car. & K. 642.

In an action against an attorney, for negligence, in not obtaining an answer to a bill in Chancery, the deposition of an agent of the defendant stated that he had written letters, setting them forth; held, that the deposition was admissible, as far as the fact of having written such, but not as to the letters, they not being produced; Tufton *v.* Whitmore, 12 Ad. & El. 370.

A letter of instructions from the plaintiff, as principal, to his agent, not having been communicated to the defendant, or his agent, was rejected in Smethurst *v.* Taylor, 13 Mee. & W. 545.]

(*c*) In Fairlie *v.* Hastings, 10 Ves. 127; he cites Bouerman *v.* Radenius, 7 T. R 663.

(*d*) [And that the admission was made whilst and as agent, should also be proved; *vide* Allen *v.* Denstone, 8 C. & P. 760, *ut supra*. Entries in the account books of an agent charging him with receipts, being signed by him, were held admissible, even although they were not in his own handwriting; (*Per* Tindal, C. J.) Doe *v.* Stacey, 6 C. & P. 139. An admission by a person lately admitted a partner, held inadmissible in an action by the other partners, unless the new one could be shown to have been authorized to make it; Tunley *v.* Evans, 2 Dowl. & L. 747; S. C. 14 Law J., N. S. 116, and 9 Jur. 128. As to admissions by partners, *vide supra*, p. 464, n. (*b*).]

that "the reasons often assigned for it, by Lord Mansfield, were, that it must be permitted to men to 'buy their peace,' without prejudice to them if their offer did not succeed; and such offers are made to stop litigation, without regard to the question whether any thing, or what, is due. If," Mr Justice Buller continues, "the terms 'buy their peace,' are attended to, they [357] will resolve all doubts on this head of evidence: but for an example I will add one case. If A. sue B. for 100*l.*, and B. offer to pay him 20*l.*, it shall not be received in evidence; for this neither admits nor ascertains any debt, and is no more than saying he would give 20*l.* to get rid of the action. But if an account consist of ten articles, and B. admits that a particular one is due, it is good evidence for so much." (*a*) Thus Lord Redesdale said, "The accepting a release of a right, is in no case an acknowledgment that a right existed; it amounts only to this, I give you so much for not seeking to disturb me." (*b*)

Nor accepting a release.

Constructive admissions;

In general, if a party reads a portion of a writing, or makes use of a portion of a conversation, in evidence, he gives credit to the whole; and affords an opportunity to his adversary, to use any other portions, that may suit his purpose. (*c*) The Court does not, however, give to evidence introduced thus constructively, by the mere rule of practice, any peculiar force. It comes, indeed, often, under all the disadvantage of being the statement of a strongly biassed witness, perhaps the adverse party himself. Still, it cannot be treated as an absolute nullity, as if there were no evidence whatever on the point, and some weight must be attributed to it, unless something can be brought forward to neutralize it. (*d*)

(*a*) Bull. N. P. 236.

(*b*) In Underwood *v.* L. Courtown, 2 Sch. & Lef. 67. [It has been held at law, that where an offer was stated in one part of a correspondence, to be made "without prejudice," that qualification was to be taken as extending over the whole correspondence, and to render letters, though omitting those words, still inadmissible; Paddock *v.* Forrester, 8 Sc. N. S. 734.]

(*c*) [As to the case of an affidavit, *vide supra*, and Vicary's case, Gilb. Ev. 57. A plaintiff at law, by his counsel, putting in, as evidence, a letter from the attorney of the defendant, purporting to be an answer to one from the attorney of the plaintiff, must also call for, and put in, the one to which it is an answer, as his own evidence; Watson *v.* Moore, 1 Car. & K. 626]

(*d*) See Bartlett *v.* Gillard, 3 Russ. 156; and *vide supra*, p. 15.

[In the Admiralty Court, an offer to pay a demand, though it does not bind the party, as an acknowledgment of the debt, considered as a proof of a doubt as to the validity of any prior discharge of it; Huntcliff Cole, 2 Hagg. 288.]

This kind of admission is most apt to be taken advantage of in matters of account, where a person's private books are the best, and often the only evidence of his having received money. Thus, a plaintiff's account book having been put in, Lord Hardwicke held that, "Inasmuch as the defendant read that part of the book from him, wherein was contained the charging part of the account, the plaintiff was entitled to read the discharging part as evidence for himself. And," he added, "it is the general rule of the Court, that where a paper is produced by one of the parties, from which he takes his charge, the same paper may be read, by the other party, by way of discharge." (*a*) This is according to the rule, at law, thus [358] expressed by Lord Hale, as common practice; "The confession of a party must be taken whole, and not by parts; as if to prove a debt it be sworn that the defendant confessed it, but withal he said, at the same time that he paid it, his confession shall be valid as to the payment, as well as that he owed it." (*b*)

from reading part of an account;

But we have seen that reading a passage from an answer in the cause, admits as evidence such parts only as are connected with it; (*c*) consequently, it has not the same effect as to an account. In *Blount* v. *Burrow*, (*d*) "Lord Ch. Hardwicke declared, that the rule of this Court and the Court of law, as to reading an answer or examination against a party, is different; that this Court is too confined in its rule, and the Court of law too large: that one part of an answer in this Court may be read against a party, without reading the answer throughout, but at law it is otherwise; and if the Judge at law considers that though the whole of the answer is read there, yet every part of the answer or examination is not of equal credit, (*e*)

from reading part of an answer.

(*a*) Carter *v.* Colraine Lord, quoted in 2 B. & B. 384; and see the principal case there, and Durston *v.* Oxford Lord, 1 Eq. Ca. Abr. 10, and Bayley *v.* Hill, ibid. [Where an account furnished by a party, before any suit was instituted, is produced to charge him with the items, on the debit side, he is entitled to resort to the credit side in support of his discharge; Boardman *v.* Jackson, 2 Ball & B. 382.]

(*b*) Trials per Pais, 363.

(*c*) *Vide supra*, p. 14, *et* p. 16.

(*d*) 4 B. C. C. 75. See Ridgeway *v.* Darwin, 7 Ves. 405; Thompson *v.* Lambe, 7 Ves. 588.

(*e*) Lord Mansfield says, in Bermon *v.* Woodbridge, Doug. 788, "Though the whole of an affidavit or answer must be *read*, if any part is, you need not believe all equally: you may believe what makes against his point who swears without believing what makes for it." [*Et vide supra*, p. 16, n. (*d*).]

he thought the rule of law to be preferred. In this Court, if a man is to be charged by a book or other writing, he shall also be discharged, if the entries are made for that purpose therein; and so have been many cases relating to goldsmiths' and merchants' accounts; and that was allowed in a case relative to the estate of Sir Stephen Evans. But what is sworn by a man's answer or examination admits of a different consideration. As if a man admits by his answer that he received several sums at particular times, and in the same answer swears that he paid away those sums at other times in discharge,
[359] otherwise it would be to allow a man to swear for himself, and to be his own witness." (*a*)

But the rule extends no farther than the answer *in the cause*. (*b*) "In this Court, as well as in a Court of law, where the answer of a party in *another* cause is resorted to as evidence, the whole of it becomes admissible; and so," (Lord Manners says,) "I conceive with respect to any other document made evidence in the cause; and the rule of the Court, as to the defendant's discharge by the schedule to his answer, does not apply to the case." (*c*)

(*a*) [*Sed vide sup.* p. 7. n. (*c*). Anon. case, in 1707; and Serjeant Peake's note, p. 56. As to admissions in an answer.] See also a case cited *supra*, p. 16; and see Parteriche *v.* Powlett, 2 Atk. 383. "The case of Howard *v.* Brown was the first in this Court where, because a man had charged himself by answer, his answer was allowed as a good discharge; and it ought to be the last." *Per* Trovor, &c. Commissioners, 2 Vern. 194.

(*b*) [If plaintiff (at law) read an answer of a defendant he is bound by it as evidence; but when, after reading it, he desires to retract, he may do so; he may deliberately elect to withdraw any part of it; Hickson *v.* Aylward, 3 Mee. & W. 33.]

(*c*) Beardman *v.* Jackson, 2 B. & B. 386. *Vide supra*, p. 36, &c.

[The consequence arising from an answer in Chancery being considered, at law, as an admission only, is, that the objection of its being *res inter alios acta* does not apply, as in the case of other legal proceedings; therefore in an action against B., the answer of A., his partner, to a bill filed against him by other creditors, was admitted as evidence of the facts stated in it; Grant *v.* Grant, Peake's N. P. 203. And so (by the way) was the voluntary affidavit of one man who was jointly interested with another in an action brought against them both; Vicary's case, Gilb. Ev. 57, *semble* S. P. The effect of declarations of a party in possession in an answer to a bill in Chancery, see Roe d. Trimleston Lord, *v.* Kemmis, 9 Cl. & Fin. 780.]

Credit due to witnesses.

The credit which the Court will give to the testimony of an individual witness, or to the whole mass combined, varies so much, that the advisability of examining them and the topics of their examination, must be dictated by the facts of each case, experience, and common sense.

Disadvantage of the system adopted.

The disadvantage under which the Court must always labour with respect to them is obvious; it is quaintly expressed in the Treatise of the Court of Star Chamber; "Now concerning the persons of witnesses examined in Court, it is a great imputation to our English Courts (*a*) that witnesses are privately produced, and how base or simple soever they be, although they be *testes diabolares*, yet they make as good a sound, being read out of paper, as the best; yea, though a lewd and beggarly fellow take upon him the name and person of an honest man, and be privately examined, this may easily be overpassed, not easily found out; whereas in Ecclesiastical Courts the witnesses must be sworn in Court in presence of the proctor of the other side at least: But to prevent these [360] inconveniences, the Lord Chancellor Egerton took an order that every witness which was examined in Court should be showed to the attorney of the other side, and his name and place of abode delivered, to the end that he might be known to be the same person, and that the other side might examine him also if they please." (*b*)

Court ignorant of what sort of person the witness is.

Order for witnesses to be shown to the other side.

Later Orders.

A similar regulation is contained in Lord Clarendon's Orders in Chancery; (*c*) and it is always expected that the age and profession of the witness shall be mentioned. To these faint attempts on the part of the Court to escape the inconvenience of not knowing what sort of person the evidence proceeds from, a little may be added in some instances, by framing the interrogatory so as to show circumstances which mark and individualize the witness.

Attempts to mark the witnesses.

(*a*) That is, where the proceedings are by English bill.

(*b*) 2 Collect. Jurid. 200. [The wholesome rule here adverted to, was established in Chancery, at least as early as the 38 Eliz.; as shown by an Order of April, 1596, Sir John Pinkering, K., and Sir Thomas Egerton, M. R.; Sand. Ord. 70; see also ibid. 228.]

(*c*) Bea. Ord. 185; [Sand. Ord. 301.] It is repeated with more particularity in 1685; Bea. Ord. 262. [Sand. Ord. 366. And amended, (*ut supra*, p. 65,) in 1828; Sand. Ord. 718, and see in 1842, ibid. 923. *Vide supra*, p. 65, n. (*a*), n. (*b*), and n. (*c*).]

Scientific witnesses,

This is particularly the case, with regard to a class of witnesses, who ought not to be passed over without notice; namely, scientific persons, or persons whose pursuits have led them to the attainment of extraordinary proficiency in any peculiar branches of science, or information. Such persons carry with them an authority to which even the Court will bow; sometimes at the sacrifice of its own better judgment.

should be identified.

Consequently it may be useful to let it appear upon the depositions that the witness is the writer of such a work, or the author of such an invention, or discovery, (*a*) &c. &c. Any information, therefore, which can be obtained beforehand respecting the witnesses to be examined to such questions, particularly in a commission to a foreign country, may be turned to account.

Circumstances appearing on the return of the commission.

Sometimes, but rarely, circumstances will appear upon the return of the examiner or commissioners, upon which observations may be grounded affecting the weight of the testimony.

[361]

For instance, the form of the religious ceremony in administering the oath;—with regard to which Lord C. J. Willes observed, in *Omichund* v. *Barker*, (*b*) "I do not think the same credit ought to be given, either by a Court or a Jury, to

Witnesses not Christians.

(*a*) It may be permitted here to observe that witnesses of this description are apt to make themselves appear less trustworthy, by forgetting that their science has advanced them beyond the ideas of people in general. [For example,] Mr. Brunell [now Sir Isembard Brunell the eminent Engineer,] being asked, in cross-examination before a committee, some years ago, how fast steam-carriages might be expected to travel on railroads, answered "Very possibly ten miles an hour," upon which the counsel contemptuously bid him stand down, for he should ask him no more questions, and the weight of his former evidence was much impaired. [Since then his astonishing work, the Tunnel under the Thames, has happily put his character as an engineer so far above all contempt, that on such topics such a witness, properly used, is a host in himself.

As to the judgment of Masters of the Trinity House, sitting in the Court of Admiralty, not being controlled by evidence, (as to matters of mere nautical practice and experience,) of witnesses however competent; see Gazelle Hurst, 1 W. Rob. 474. Where in criminal courts, on a question of insanity of the accused, a medical man has been in Court and heard the evidence, he may be asked, as a matter of science, whether, supposing the facts to be as testified, they show a state of mind incapable of distinguishing between right and wrong; M'Naghten's case, 10 Cl. & Fin. 200. And as to the use at Nisi Prius, of the testimony of a scientific man, as to what opinion he formed, after hearing the evidence, and supposing it to be true, see also Fenwick v. Bell, 1 Car. & K., N. P. 312.

Medical evidence admissible in the Ecclesiastical Courts is of two kinds. Conclusions, drawn by persons of skill, from facts proved in the cause *aliunde*. And opinions, founded on the observation and inspection of the medical man himself; Collett v. Collett, 1 Curt. 687. The like distinction must hold in Courts of Equity.]

(*b*) Willes, 550. [*Et vide supra*, p. 66 *n*, as to the ceremonies in administering the oath.]

an Infidel witness as to a Christian; who is under much stronger obligations to swear nothing but the truth." [By the general term Infidel his Lordship here designates an unbeliever.] (*a*)

Remarks of C. B. Gilbert on witnesses.

The following observations of Lord C. B. Gilbert contain several useful hints. (*b*)

"That which renders the testimony of a witness doubtful is, the attestation of the several circumstances, and yet no proof of any one of those circumstances, to fall in with what he attests; this may render such a witness (standing alone without any assistant proof) to be very much suspected, and there must be great confidence in the integrity, and veracity, of the man, to believe many circumstances on one man's single testimony, where, if it were true, there might be a multitude of concurrent proofs, to strengthen and confirm the evidence.

"Another thing that would render his testimony doubtful is, the not giving the reasons, and causes, of his knowledge; for if a man could give the reasons, and causes, of his knowledge, and does not, he is forsworn; because he is obliged to tell the *whole* truth, and by consequence he is of no credit; and that a man should know any thing, and not [be able to] tell how he comes to know it, is incredible.

"The same may be said as to persons who take upon them to remember things long since transacted; for if the matter be frivolous, they ought to tell the causes of their memory, otherwise the memory is little to be credited; for they are rather to be supposed as rash persons, who take upon them to swear what they do not perfectly remember, than that they are really under the awe, or conscience, of an oath, for then they would be able to tell the reason and certain marks of their remembrance.

(*a*) [However illiberal this remark may seem, the time has not yet arrived (if it ever will) when the credibility of all men can be equal; even stat. 6 & 7 Vict. c. 85, which has let in almost all mankind, however unworthy of credit they may be, and although of classes hitherto considered infamous, and not worthy of any credit, nevertheless adverts to the fact that, although "any interest which a defendant in any cause pending in a Court of Equity" (so to be examined as there provided) "may have in the matter, or any of the matters, in question in the cause, shall not be deemed a just exception to the testimony of such defendant," yet it will "be considered as affecting, or tending to affect, the credit of such defendant, as a witness." So with impiety, short of atheism, (as to which, *vide supra*, p. 329, n. (*c*), *ad finem*,) and any other deficiency, or obliquity, of principle.]

(*b*) Gilb. on Ev. 150.

indiscriminately to the jury; yet the Judge generally charges that they *must* find in accordance with the presumption of law, and often refuses to receive the verdict of it if it is otherwise. In Equity there is a more tangible test;—the Court, if necessary, will send a presumption of law, to be tried by an issue of law, but will never refer it to a trial before a jury. (*a*)

Obligatory presumptions, or presumptions of law; those anterior to evidence;

Among the established presumptions of law, there are some which are anterior to all evidence; as,—that every body knows the law, (*b*)—that a person who was living is, (within a possible period,) still alive, (*c*)—that a person in possession is the owner, and that the owner is in the fullest enjoyment of all the rights and appurtenances, (*d*)—that every one, (even a prisoner,) has acted rightly and honestly,—or a still more general one, "*odiosa et inhonesta non sunt in lege præsumenda, et in facto quod in se habet et bonum et malum, magis de bono quam de malo præsumendum est.*" (*e*)

With regard to all, the maxim holds good, "*stabitur præsumptioni donec probetur in contrarium.*" (*f*) But it will

(*a*) See Ellison *v.* Cookson, 1 Ves. 108; and *infra*.

(*b*) [Which is extended to an apparently absurd degree, when every testator is presumed to know the rules of law, as in Ellison *v.* Cookson, 3 B. C. C. 62, and 1 Ves. 108. But this is a mere rule of construction of testamentary documents.]

(*c*) Wilson *v.* Hodges, 2 East, 312. [Where a witness proved that he had received a letter from his daughter in her handwriting, and dated Van Dieman's Land, 17th March, 1831; her husband having married a second time on the 11th April, 1831; held, on a question of the validity of the second marriage, that such letter was admissible in evidence, and that the justices (or a jury) were warranted in coming to a conclusion therefrom (by way of presumption) that the first wife was living at the time of the second marriage; Rex *v.* Harborne, 4 Nev. & M. 341. As to the contrary presumption after seven years and no tidings, *vide infra*. Insanity as well as sanity is presumed to continue until proof to the contrary, and so with other similar circumstances.]

(*d*) For instance that one in possession and the pernancy of the profits of land is owner of the fee; Jayne *v.* Price, 5 Taunt. 326. This, however, will, in practice, generally require to be proved. See Coventry on Conveyancers' Evidence, p. 274. The rule is of great use in questions of title, ibid. p. 300; but it applies more forcibly to chattel interests, see Thiern *v.* Mill, 13 Ves. 122.

[As to inference from user of rights, see stat. 2 & 3 Wm. 4, c. 71. As to watercourse prior to that statute, see Finch *v.* Resbridger, 2 Vern. 390.]

(*e*) 10 Co. Rep. 56. [Fraud, or not fraud, is a conclusion at law resulting from facts. Confession is no fact, but merely evidence of it; Mulholland *v.* Hendrick, 1 Beat. 280. The circumstance that one residuary devisee was the attorney, who drew the will, is not decisive evidence of fraud; Paine *v.* Hall, 18 Ves. 475.]

(*f*) [Thus, the presumption of payment of a bond, after twenty years, was repelled, by evidence of impossibility in Fluding *v.* Winter, 19 Ves. 196. And where the inability of an administrator to purchase an estate, with his own money, is relied upon, as a ground for following that estate, as part of the

be convenient to confine ourselves to those which are raised, when, from certain facts, or circumstances, proved and established, certain other facts, or circumstances, are held, in law, to be absolutely proved, either conclusively, or until sufficient counter evidence has been brought to repel the presumption.

Those, to which the law gives the privilege of conclusiveness, are called presumptions *juris et de jure;* they are, in fact, a species of estoppel. (*a*) Such is the rule, "*pater est quem nuptiæ demonstrant,*" or (to use more accurately the form in which our law has adopted it,) the presumption that a child born of a woman, whose husband was living with her, at the proper period, and had no physical incapacity, is his legitimate offspring. Formerly, every child was considered legitimate, whose mother's husband had been within the four seas at the time of the conception, but the strictness of that rule led to such absurd and cruel consequences, (*b*) that of late years, the husband has always been allowed to prove that he and his wife were at a distance from one another, and the question has turned upon the possibility or probability of access. (*c*) We have discussed in a former chapter one of the most extensively applicable presumptions of this class, namely, that which forbids the

Presumptions *juris et de jure.*

[365]

assets of the intestate, such inability must be shown by evidence of facts, from which the strongest conclusions can be drawn, and not merely, or principally, by evidence of the opinions of witnesses; though such witnesses may have been well acquainted with the affairs of the party, and their testimony may be corroborated by circumstances of suspicion; Wilkins *v.* Stevens, 1 Yo. & C. 431. See an analogous case, as to the value of certain presumptions of payment of portions, (prior to the late Statute of Limitations); Standish *v.* Radley, 2 Atk. 178.]

(*a*) Presumptions of law are closely allied with estoppels; "If a man gives a receipt for the last rent the former is presumed to be paid, because a man is supposed first to receive and take in, the debts of the longest standing; especially if the receipt be in full of all demands, then 'tis plain there were no debts standing out; and if this be under the hand and seal, the presumption is so violent, that the law admits no proof to the contrary; because that were to let a man invalidate his own deed, which our law doth not permit." Gilb. on Ev. 160.

(*b*) There were actually instances of acts of Parliament being passed, in flagrant cases, to declare persons so situated, illegitimate, and to deprive them of the power of inheriting. [And quite recently, see an act of Parliament, as to Margetts *soi disant* Ld. Leicester.]

(*c*) [Access or non-access must now be proved like any other fact, see Shelley *v.* ——, 13 Ves. 58; Pendrel *v.* P. 2 Str. 925; the Banbury Peerage Case, 2 Selw. N. P.] The evidence on the husband's part ought to be so strong as to exclude all doubt; see Head *v.* Head, 1 S. & S. 150; 1 T. & R. 139; Morris *v.* Davies, 3 Car. & Payne, 218, 427; Berry *v.* Phillpot, 2 M. & K. 349. All the cases on this subject are collected and laboriously examined in Sir Harris Nicholas's Treatise on Adulterine Bastardy; and see Math. on Pres. p. 20.

questioning of a point already decided by a competent tribunal. (*a*) Pothier has a long section on this subject, (Part IV. ch. 3, s. 3,) entitled, "On the authority of *res judicata*;" and it is treated at length in Sir W. D. Evans's Appendix. Another kind which falls under this head, consists of those limitations, statutory or otherwise, which preclude the questioning of the rights which they establish. Such is the presumption from five years of non-claim—after a fine with proclamations; that
[366] from twenty years of undisturbed possession on the part of a mortgagee; (*b*) and that from prescription, when the enjoyment has been from time immemorial. (*c*)

Very closely allied to presumptions, *juris et de jure*, are those, which a Judge directs a jury to make, so peremptorily, that if they bring a contrary verdict it will be a ground for a new trial. In one instance, "Lord Mansfield declared that he, and many of the Judges, had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagee." (*d*) The reason was, that it would be inconvenient to allow that species of trial to be defeated by a formal objection; and it was considered for many years as an invariable rule. (*e*) But Lord Kenyon, though he said that he "extremely approved of it," found it necessary to introduce a modification, (*f*) and

(*a*) *Vide supra*, p. 421, *et seq.*, &c.
[The determination of the Privy Council to advise the Crown to grant a charter, under the stat. 1 Vict. c. 76, s. 49, is not conclusive as to its validity; Rutter *v.* Chapman, 8 Mee. & W. 1.
The Courts of Equity will not take it for granted, the Ecclesiastical Court has ascertained, that the person, of whose will they have granted probate, or to whose estate they have granted administration is actually dead; *vide sup.* p. 442, n. (*c*). And, indeed, the occurrence of errors in this respect has put the Courts on their guard; however a Court of Law, at Nisi Prius, has held that the production of probate copy of a will, the copy of an entry of a burial in a register, and the testification of a legatee having received a legacy, was altogether sufficient to prove the decease; Doe *v.* Penfold, 8 Car. & P. 536. *Sed vide supra*, p. 250.]

(*b*) The law on this subject is collected in Math. on Pr. p. 329, &c.

(*c*) "In the case of prescription if it be 'time out of mind,' a jury is bound to conclude the right from that prescription;" Lord Mansfield in The Mayor of Hull *v.* Horner, Cowp. 109. [And now see stat. 2 & 3 Wm. 4, c 71, for shortening the time of prescription in some cases; stat. 2 & 3 Wm. 4, c. 100, and 4 & 5 Wm. 4, c. 83, as to the time in claims of *modus decimandi*; and stat. 3 & 4 Wm. 4, c. 27, for the limitation of actions and suits, amended by stat. 1 Vict. c. 28.]

(*d*) In Lade *v.* Holford, Bull. N. P. 110. [But now as to terms, *vide infra*, p. 477, n. (*c*).]

(*e*) In Evans *v.* Bicknell, 6 Ves. 184.

(*f*) Doe d. Hodsden *v.* Stapel, 2 Tr. 696.

Lord Eldon expressed a fear of great inconveniences arising from it, (*a*) and, as far as it relates to terms assigned to trustees to attend the inheritance, its validity has been most strongly controverted. (*b*) Where, however, no such assignment has been made, the presumption may be looked upon as compulsory. (*c*)

Presumptions of Law.

All other Presumptions of Law, (being *juris* only, not also *de jure*,) may be impeached by evidence, some requiring more, some less, to overthrow them; according to the degree in which the mind of the Court is affected. The principal heads under which they may be classed are noticed in the ensuing pages; but for any of the points of the law on this subject reference may be most advantageously made to Mr. Matthews's Treatise.

[367]

I. From the usual habits and feelings of mankind.

First; We have seen that in several instances, from the *data* of certain acts or certain instruments, the Court, arguing from the usual habits of mankind, ventures to pronounce authoritatively what have been the intentions of a testator; and that there, proofs of every kind have been resorted to in order to repel or support ill-defined presumptions; even until documents have been interpreted by parol evidence, in contravention of the Statute of Frauds. (*d*) Speaking of one of these, Lord Thurlow said, "The argument is, that the will is a distribution of the testator's property among his children; and if he advances the proper portion to a child, the *presumption of law* is, that the provision is satisfied. I say *presumption of law*, because it is put that it is proper to go to a jury; but that would be to send to a jury, a presumption of law. At the same time it is a presumption capable of being rebutted by evidence. (*e*)—With respect to the rule of law, I think that if neither the rule itself nor the mode of rebutting it, had ever prevailed, it would have been as wise: but, as it is, I must admit that such a presumption exists; and though it is argued

(*a*) In Doe d. Bowerman *v.* Sybourne, 7 T. R. 2.

(*b*) See Sugd. on Vend. Ch. 9, s. 4.

(*c*) See Emery *v.* Grocock, 6 Mad. 57; Doe d. Brandon *v.* Calvert, 5 Taunt. 170. [But now see the stat. 8 & 9 Vict. c. 112, intended to render assignment of satisfied terms unnecessary.]

(*d*) *Vide supra*, p. 293.

(*e*) [As to which, *vide supra*, p. 297.]

testators may not know it, yet, I think, if there is such a presumption, the subject is bound to know it." (*a*)

The same observation of men's usual habits (*b*) leads to a variety of presumptions, as, for example, the presumption by which a tenant in tail (who might, at any moment, acquire the fee simple), paying off an incumbrance, is considered to do so for the exoneration of the inheritance; while a tenant for life is considered to be doing so for his own personal convenience, and to be merely substituting himself for the other incumbrancer. (*c*) Thus, a testator destroying one duplicate of
[368] his will, is presumed to have intended to destroy the counterpart. (*d*) And, (though the reasoning has, with great justice, been questioned,) a debtor, leaving a legacy to his creditor, will be taken to have intended it in satisfaction of his debt. (*e*)

On the same ground, an advantageous offer, such as a devise or a conveyance to an individual, (even though in trust only), will be presumed to have been accepted by him, until he can prove that he has renounced it. (*f*) Thus also "*primâ*

(*a*) Ellison *v.* Cookson, 3 B. C. C. 62, and 1 Ves. 108, where the passage is thus reported, "I say 'presumption of law,' because in arguing this question, it is generally put,—as a question for a jury as to what the intention was on the whole transaction. The objection to that is, that it is not a presumption of fact, but a question upon the validity of a presumption of law; and I cannot send that to be tried by a jury. But though it is a presumption of law, it is not that kind of conclusive presumption against which nothing can be said, but a presumption which the law makes upon the general facts, liable to be rebutted by evidence." [*Ut supra*, p. 297.]

(*b*) [The Court in an application for a *ne exeat regno* acts on evidence of intention to go abroad, without regard to a denial; Whitehouse *v.* Partridge, 2 Swan. 375. Presumption at law that a note was one for five pounds, being the smallest then current, and it being proved that one was handed over, see in Lawton *v.* Sweeney, 8 Jur. 964.

In the Admiralty Court on questions of false destination, the fact of the vessel being out of the course for the reputed port prevails (as presumptive evidence) over dubious explanations thereof; Franklin, Segerbrath, 3 C. Rob. 219. In a case of collision in the Admiralty Court, a letter by the master of the vessel doing the damage, addressed to his owners, given to the master of the vessel damaged, and not produced, presumed to contain an admission of the damage; Neptune the Second, 4 Dod. 469.]

(*c*) See the cases cited in Math. on Pr. 47; and see Drinkwater *v.* Combe, 2 S. & S. 340; Wigsell *v.* Wigsell, 2 S. & S. 364; Astley *v.* Milles, 1 Sim. 298; Trevor *v.* Trevor, 1 M. & K. 675.

(*d*) Pemberton *v.* Pemberton, 13 Ves. 310.

(*e*) See Math. on Pr. 105.

[As to presumption of the payment of a legacy, see Ravenscroft *v.* Frisby, 13 Law J. N. S. 153.]

(*f*) A man's *conduct* may be sufficient proof of renunciation, Stracey *v.* Elph, 1 M. & K. 195. On the general question, see Townson *v.* Tickell, 3 B. & A. 31. Mr. Mathews investigates the point whether on death without this

facie it is to be presumed, that the purchaser in an ancient conveyance had actual inspection of every deed recited, and was satisfied with their contents; and, further,—it is not probable that a vendor would recite deeds which afforded evidence against his title," therefore, the loss of a deed recited throws no reasonable doubt upon a title. (*a*) In contracts, the general nature of the subject, and local usage, afford grounds for presumption; if the mere existence of a tenancy be proved, it will be presumed to be from year to year; and if the day of its commencement does not appear, it will be fixed from the custom of the country. (*b*)

It is on an analogous principle of experience (but here applied rather to the physical, than the moral, habits of men), that the rule is founded *semel furibundus semper furibundus præsumitur;* (*c*) and that paternity is presumed from access. (*d*)

proof, the estate devolves upon the heir; and concludes that where the ignorance of the ancestor is the utmost that can be proved, the heir inherits the estate, and cannot devest himself but by a regular conveyance; see Math. on Pr. 32.

[The consent of the parish to a suit by churchwardens, proved by entry in Vestry Book; case of Radnor Par. 4 Ven. 529, pl. 10. The consent of the creditors of a bankrupt to the institution of a suit by his assignees is not presumed, and though filed amongst the proceedings in a bankruptcy must be proved; Smith *v.* Biggs, 5 Sim. 391; *sed vide, ex parte* Evans, 3 Dea. & Ch. 470; Jones *v.* Yates, 3 Y. & J. 373; Piercy *v.* Roberts, 1 M. & K., overruling it.

Presumption, as to assessments, purporting to be signed by Commissioners of Land Tax; see Doe *v.* Young, 9 Jur. 941. As to a person being churchwarden, see Ganvill *v.* Utting, 9 Jur. 1080.]

(*a*) Prosser *v.* Watts, 6 Mad. 60, [which furnishes one reason for recitals in deeds, now so decried by ignorant persons. Where the deed creating a rent was lost, so that it could not appear what sort of rent it was, a bill was sustained for payment of twelve years' arrears, upon the presumption arising from proof that it had been constantly paid prior to that time; Collett *v.* Jaques, 1 Ch C. 120.]

(*b*) [Special covenants as to cultivation of a farm are not implied from the mere act of holding over; as they may be from payment of rent at the same period, as evidence of agreement to hold, not only on the same terms, but subject to the same covenants; Kimpton *v.* Eve, 2 V. & B. 349. As to presumption of property in lands by the road-side, being in the owners of adjacent lands, see 1 Byth. Jar. 463. The fact that property, situate on the sea-shore, between a sea-side town and the sea, had not been assessed to the poors' rate of the parish, in which the farm was situate; held to be very slight evidence of the property not being within that parish; Perrott *v.* Bryant, 2 Yo. & Col. 61. Parish lands being, by stat. 39 Geo. 3, c. 12, s. 17, vested in the churchwardens, &c., for the time being; held that proof of payment of rent to the churchwardens, and of leases of the premises having been made by them, describing them as parcel of the lands of the parish church, was *primâ facie* evidence of the lands being parish property; Doe d. Higgs *v.* Terry, 5 Nev. & M. 556.]

(*c*) The course of procedure when an act is alleged to have been done during a lucid interval, is spoken of in Att. Gen. *v.* Parnther, 3 B. C. C. 441; and see Digby E. of, *v.* Howard, 4 Sim. 597. [As to lunacy, *vide supra*, p. 233, n. (*b*).

(*d*) [But as to access or non-access of husband and wife, *vide supra*, p. 475.]

II. *Omnia rite acta.*

Secondly; The principle, *omnia præsumuntur rite et solemniter acta,* is called into operation; whenever circumstances have been proved, which show that, supposing the non-existence of the fact in question, an individual has acted wrongly or negligently, either through omission or commission. Thus, the Court presumed that a rector had read the articles on his induction; (*a*) and that the first husband of a woman, who had married a second time, was dead." (*b*)

[369]

Lord Mansfield (after observing that presumptions of this kind "must have a ground to stand upon, something from whence to arise") continues, "A tenant in tail may, if he pleases, turn his estate tail into a fee, or alienate it for his own benefit, by duly suffering a common recovery, but he must have a sufficient estate and power to qualify him to suffer such recovery.—Where a person has power to suffer a recovery, and thereby bar the estate tail, *omnia præsumuntur rite et solemniter acta,* until the contrary appears.—So where the freeholder is a trustee for the tenant in tail himself, and under his power and direction, it is a reasonable and just cause for presuming, that every thing was regularly transacted. So where the person or persons interested to object against the validity of a recovery, have had opportunity to make objections to it, but instead of doing so have acquiesced under it, and not at all disputed its validity; this is a presumption that all was right and regular, forasmuch as they never did object to it." (*c*)

The numerous cases which fall under this head have been collected in other works, particularly in that of Mr. Matthews on Presumption. The following passage, from a judgment of Sir W. Grant, in *Wilson* v. *Allen,* (*d*) will show, with sufficient accuracy, the extent to which, in modern practice, the doctrine

(*a*) Chapman v. Beard, 3 Anstr. 942.

(*b*) R. v. Twyning, 2 B. & A. 386. [But as to this see the case R. v. Harborne, cited fully above, p. 474, n (*c*), and yet that such latter marriage is, *primâ facie,* to be held valid in a criminal prosecution, there can be no doubt.]

(*c*) Bridges v. Chandos D. of, 2 Burr. 1073. But Mr. Coventry says that, in this case, "several presumptions appear to have been made by Lord Mansfield which are not adopted by the conveyancer;" Conv. Ev. 80. *Ut e. g., vide supra,* p. 416.

[And now see stat. 3 & 4 Wm. 4, c. 74, as to Fines and Recoveries, the assurances substituted for them, in England, and stat. 4 & 5 Wm. 4, c. 92, as to the like, in Ireland.]

(*d*) 1 J. & W. 619.

can be carried. "The objection is, that the enfranchisement by the Duke of Norfolk, in 1791, was not valid, from a defect in the title of the person to whom it was made, and that the premises are, therefore, still copyhold. It is said that *John Allen's* title was defective, being derived from *Thomas*, whose admittance was not preceded by a surrender of the estate of [370] the trustees, and that the legal title, on that account, continuing in them, it was not competent to the lord, under this act of Parliament, to enfranchise the land by the conveyance that he made.

"In answer to this it is said, in the first place, that though no surrender appears upon the rolls, yet it does not follow that none took place; that, as it was the duty of the trustees to convey, on the accomplishment of the primary purposes of their trust, and as those purposes are admitted to have been answered, a Court ought at this time, in favour of long possession, to presume that *John Allen* had procured a surrender, so as to constitute him the legal tenant. On the other side, the case of *Doe* v. *Waterton*, in the King's Bench, was cited, where the Court would not, after a long period of seventy or eighty years, presume, in favour of a charity, that a bargain and sale had been enrolled, a form made necessary to its validity by the statute. But I think that case has been rightly distinguished from this; there the Judges thought that, as certain forms were made necessary by statute, they were not at liberty to presume against the policy of the law, and, dispensing with those forms, to give to the charity an estate, in the conveyance of which they had not been observed. That appears to have been the ground of the decision; one of the Judges certainly remarking, that if there had been a chasm in the records, they might have made the presumption, but that they could not without.

"Here there is no law interposing against the presumption of the trustees having done their duty; and it is, therefore, more near to the case of *England* v. *Slade*, (*a*) where Lord

(*a*) 4 T. R. 682.

Kenyon held that a conveyance ought to be presumed, within a year after the period fixed for it by the trust. There is the same ground for such a presumption here, besides the long period of enjoyment. In addition to this authority, there is a case of *Lyford* v. *Coward*, (*a*) (which is cited by Watkins), where, after forty years' possession under a will, a surrender to
[371] the use of it was presumed. These cases afford strong ground for thinking, that here, where the circumstances are more favourable, the possession being longer; and after two admittances, the lord thus recognising these persons as his tenants, we might, if necessary, presume the surrender." (*b*)

Formalities of a deed, &c.

It has been mentioned in an earlier chapter (*c*) that [some of] the formalities of a deed are readily presumed—that sealing and delivery will be presumed from proof of signing—and that the whole will be presumed after thirty years without any proof at all, or within that time from proof of a deceased subscribing witness's handwriting. Thus, on a demurrer to a bill for specific performance which stated that the agreement was in writing, signature was presumed. (*d*) And thus when secondary evidence of an instrument is admitted, it would require strong proof to rebut the presumption that the original was properly stamped. (*e*)

III. Statutary.

Lastly; some presumptions have been directed by the Legislature to be raised. An instance is afforded by the Stat. 19 C. 2, c. 6, which, after speaking of mischiefs frequently happening to lessors and reversioners of leases for lives, enacts, "That if the person or persons for whose life or lives such estates have been or shall be granted as aforesaid, shall remain

(*a*) 1 Vern. 195.

(*b*) [Add to these such presumptions as that made by the House of Lords, that a Peerage (under certain circumstances in evidence) was created by writ of summons and descendible to heirs general, see Vaux Peerage Case, 5 Cl. & Fin. 526. And so that the claimant's ancestor having sat in Parliament, and yet no patent or charter of creation to be found, it was to be presumed to have been created by writ of summons; Braye Peerage Case, 6 Cl. & Fin. 657.]

(*c*) *Vide sup.* p. 177-8. [As to stamp, *vide sup.* p. 391, n. (*b*).]

(*d*) Rist *v.* Hobson, 1 S. & S. 453; and see Spurrier *v.* Fitzgerald, 6 Ves. 565. So enrolment in ejectment, Doe d. Griffin *v.* Mason, 3 Camp. 7.

(*e*) R. *v.* Long Buckby, 7 East. 45. [But *semble*, now the secondary evidence is not admitted at all, if a doubt is raised as to the original having been duly stamped; Roe *v.* Clarke, 1 Yo & C. 534, *et vide supra*, p. 391, n. (*b*).]

beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient and evident proof be made of the lives of such person or persons respectively, in any action commenced for recovery of such tenements by the lessors or reversioners; in every such case the person or persons upon whose life or lives such estate depended, shall be accounted as naturally dead; and in every action brought for the recovery of the said tenements, by the lessors or reversioners their heirs or assigns, the Judges before whom such action shall be brought, shall direct the jury to give the verdict as if the person so remaining beyond the seas, or otherwise absenting himself, were dead." (*a*) This Act is [372] extended by the Stat. 6 Anne, c. 18, to infants, married women, and others whose deaths are suspected of being concealed; it provides that in case the guardian, trustee, husband, or other person, shall refuse or neglect to produce them, after an order, in the Court of Chancery or before commissioners, "the said minor, married woman, or other person so concealed, shall be taken to be dead, and it shall be lawful for any person claiming any right, &c., to enter." The Stat. 14 Geo. 2, c. 16, to amend the law of Common Recoveries, is more imperative, and precludes all question on certain points.

Allowable presumptions.

Many of the presumptions mentioned above, are called by Mr. Matthews, Presumptions of Fact, as distinguished from Presumptions of Law. He defines them to be "so called because the facts presumed are exclusively deduced from the particular circumstances of individual cases, such circumstances

(*a*) See Holman *v.* Exton, Carth. 246. [As to evidence whence the Courts of Law presume, or rather infer, decease of any person, see Doe *v.* Penfold, 8 C. & P. 536, *sup.* p. 476, n. (*a*), and *contrà*, the existence of a person; Rex *v.* Harborne, 4 N. & M. 341. In ejectment, it is not to be presumed, that a tenant for life died at the expiration of seven years from the time when he was last heard of; Doe *v.* Napean, 5 B. & Ad. 86. But in Chancery, one who had not been heard of for twenty years, having been abroad for more than twenty years, was presumed to have died before a particular time; Rust *v.* Baker, 8 Sim. 443. Presumption that a party died at a particular time within the seven years after he had been last heard of; the particular time being the hurricane months, and the party having sailed from Demerara before the expiration of that season, see Sillick *v.* Booth, 1 Yo. & C. 107. Presumptions of death of persons, not heard of, see Dowley *v.* Winfield, 8 Jur. 972. Also of decease, sans issue, Watson *v.* England, 8 Jur. 1062, and Hubb. on Ev. of Succ., Index, *voce* Death, Presumption of.]

containing them *implicité*, and yielding a kind of indirect or presumptive evidence of their existence."(*a*) But though this distinction is ingenious, it is not easy to discover a real and practical difference. All presumptions are presumptions of *fact*. An intention is a fact; and the sealing of a deed is as much a fact as the existence of the deed at all. It must, at the same time, be owned, that there is a degree of indefiniteness in the attempt made here to distinguish them into obligatory presumptions, and those which are merely allowable. This, however, arises in a great measure from the circumstance, that many assume only gradually a consistency sufficient to make them obligatory. Presumptions may be looked upon as bold inferences, pushed farther than the facts established strictly warrant. They are made for the furtherance of justice, and the Judge directs the Jury how far it is allowable to carry them. (*b*)

Presumptions bold inferences,

made for the furtherance of justice;

The power of directing the Jury to what lengths they may venture, has often been stretched beyond due limits, by the Judges, for, in cases of hardship, they have urged the Juries to presume facts which were manifestly incredible. Lord Mansfield, the character of whose mind was to sacrifice all rules to the abstract love of justice, was a great promoter of this practice. In a case of an attempt to disturb a long enjoyment, (*c*) he said, "There are many cases not within the Statute of Limitations, where, from a principle of quieting possession, the Court has thought that a jury should presume any thing to support a length of possession. Lord Coke says somewhere, that an act of Parliament may be presumed; (*d*) and of late it

—from long enjoyment.

[373]

(*a*) Math. on Pr. 186.

(*b*) [A child fears to go in the dark, presuming danger to accompany darkness, a discreet man (and the law presumes a Judge to be such an one) may quiet such fears.]

(*c*) Eldridge *v.* Knott, Cowp. 214.

(*d*) In Stafford *v.* Llewellyn, Skin. 77, where Lord Stafford had raised money by the pretended exercise of a power, "Farrar's case was cited, in the Common Pleas, where Farrar made a title from the Black Prince, which could not be out of him but by an act of Parliament; but yet, for that the possession had gone otherwise ever since, the Court presumed that there had been such an act, though not now to be found: so the Court here was ready to recommend it to the jury as a strong presumption that here was a deed to empower my Lord, it being in the case of poor tenants, from whom my Lord had raised 20,000*l.* in such a filthy unjust manner." [As to presumption of writs of summons of a peer, *vide supra*, p. 482, n. (*b*).]

has been held, that even in the case of the Crown, which is not bound by the Statutes of Limitation, a grant may be presumed from great length of possession. It was so done in the case of the *Corporation of Hull* v. *Horner:* (*a*) not that, in such cases, the Court really thinks a grant has been made; because it is not probable a grant should have existed, without its being on record; but they presume the fact, for the purpose and from a principle of quieting the possession." (*b*) So, the enfranchisement of a copyhold was presumed, under very peculiar circumstances, against the Crown, after an enjoyment of a century and a half, Lord Ellenborough declaring, "I would presume every thing capable of being presumed, in order to support an enjoyment for so long a period: as Lord Kenyon once said on a similar occasion, that he would not only presume one, but one hundred grants, if necessary, to support such a long enjoyment." (*c*) In *Wilkinson* v. *Payne*, (*d*) a jury having presumed a legal marriage, which, under the circumstances, was contrary almost to possibility, Lord Ellenborough refused [374] a new trial, and Mr. J. Buller said, "If the verdict be consistent with the justice, conscience, and equity, of the case, we ought not to grant it." But the author fully concurs in the following animadversions of Sir W. D. Evans. "The principle adopted in *Wilkinson* v. *Payne*, is certainly very dangerous in its tendency, as it goes to subvert the main foundations of the distinction between truth and falsehood. Many cases must occur in the administration of justice, where the wishes of those who are to decide must, from the nature of the circumstances,

Remarks of Sir W. D. Evans on the case of *Wilkinson* v. *Payne*.

(*a*) Cowp. 102.

(*b*) [The principle regulating the presumption of documents, in support of a beneficial enjoyment is, that where there has been a long enjoyment of any right, which could have had no origin, except by deed, then, in favour of such enjoyment, all necessary deeds may be presumed, if there is nothing to negative such presumption; Lyon v. Reed, 13 Law J., N. S. Exch. 377, 8 Jur. 762.]

(*c*) Roe d. Johnson v. Ireland, 11 East, 280. [Obviously a mere figure of speech. A purchaser, however, will be compelled to take a title, which depends on adverse possession, under the Statute of Limitations; even though the evidence of such possession consists of affidavits made in the Master's office, and the fact of such possession is not in issue in the cause; if the Court be satisfied, by the affidavits, of the existence of the facts deposed to; Scott v. Nixon, 2 Con. & L. 185.]

(*d*) 4 T. R. 468.

be in opposition to the legal right; but if we once begin to shake the rule that the Law is to command, and the Judge to obey; if we once admit the propriety of professing to believe, as true, what we are actually convinced is not so; nobody can say where the deviation will stop, and legal certainty will be sacrificed at the shrine of judicial discretion." (*a*)

Decisions of Juries.

Of the above cases, however, each adds but one to the many thousand absurd and unwarrantable decisions, which juries will venture upon during their brief and irresponsible authority; and, beyond the individual case before them the verdict has little effect.

Decisions of Judges,

But an Equity Judge, who feels that his decision will be thenceforth the law of the land for parallel cases, is bound to be more cautious; and if he is either unwilling to introduce as law a new principle of presumption, or to give the additional weight of his own authority to one partially recognised, but not yet firmly established, he will transfer the responsibility of deciding it, by directing an issue. (*b*)

—directing an issue;

He also very readily, (perhaps too much so), (*c*) seizes any opportunity which an imperfect proof of the grounds on which the presumption is to arise, may afford him, and sends the whole question to a jury.

or without directing an issue.

In a well considered case, in which Lord Erskine, affirming Sir W. Grant's judgment, thought it right to decide himself, without directing an issue, he said, "My judgment is, that at this distance of time, I ought to presume

[375]

that this reconveyance has been made. I agree, I must make that presumption. My judgment is founded upon this; and I make the presumption without sending it to law; being confident a Judge must tell a jury they ought to presume, and they would presume, that this reconveyance had been made. Therefore, I am of opinion, that this decree ought to be affirmed. I

Presumption which a Judge must direct a Jury to make.

(*a*) App. to Pothier, 331. And Mr. Starkie, with equal justice, asks, "Do not such presumptions afford temptation to juries, in hard cases, to trifle with the sacred obligation of an oath?" 2 Stark. on Ev. 685. [It seems to rest on this foundation; that if the jury will, they are told, they lawfully as well as reasonably may, believe so and so, as a consequence of the facts proved; and they rely a good deal on the judgment of one competent and bound to advise them properly.]

(*b*) [As repeatedly suggested, in Sillick *v.* Booth, 1 Yo. & Co. 121.]

(*c*) [For it should be borne in mind that the hapless suitor is not, in justice, liable to be at the expense of a double trial; unless it be absolutely necessary.]

give my judgment, laying down the general principle of law; and saying, that this case comes within it."(*a*)

The foregoing observations, are illustrated by the state of the law on a class of cases, in which there is a physical impossibility of bringing testimony to rebut whatever presumption the Courts may be pleased to make. (*b*) These are those instances, happily not frequent, in which persons have been destroyed together, by a common calamity, and all evidence of the priority of their deaths has perished with them. The arguments of Mr. Fearne, (published in his Posthumous Works,) on the case of *General Stanwix* and his daughter are well known. (*c*) In a similar case, (*d*) where a father and son had been lost on their passage from India, Sir W. Grant refused to adopt the rule of the civil law; that "where there is no evidence to the contrary, a child shall be presumed to have outlived it's parent," but unwillingly granted an issue, expressing an inclination to decide as if they had died at the same instant. That was the view which Sir W. Wynne took, as Judge of the Prerogative Court, in 1793; he said, "that with respect to the priority of death, it had always appeared to him more fair and reasonable in these unhappy cases, to consider all the parties as dying at the same instant, (*e*) than to resort to any fanciful supposition

Where no evidence can be adduced.

As in cases of doubtful survivorship;

e. g. the case of *Gen. Stanwix.*

Presumption in such cases.

[376]

(*a*) Hillary *v.* Waller, 12 Ves. 270. The point decided in this case has been questioned, see Sugd. on Vend. 324, but it was followed by Sir L. Shadwell, in Noel *v.* Bewley, 3 Sim. 103.

(*b*) [As to an accumulation of minor points of circumstantial evidence, not amounting to conclusive evidence, see Hume *v* Burton, 1 Ridg. P. C. 210.]

(*c*) [But as to that case, see observations of counsel, in Sellick *v.* Booth, 1 Yo. & Co. 125, cited below, n. (*e*).]

(*d*) Mason *v.* Mason, 1 Mer. 308. The rules of presumption, under such circumstances, laid down by the Code Napoleon (Liv. III. Tit. 1, c. 1,) are given there, in a note.

(*e*) Where the bodies are not destroyed, there will generally be circumstances observable which will throw presumption out of the question, and make it possible to decide upon facts. Thus in the case of Broughton *v.* Randall (Cro. Eliz. 503,) a widow obtained dower when her husband and his father had been hanged in one cart, but her husband had survived, as she proved "by some tokens, *viz.* his shaking his legs." The reader need not be reminded of such scenes as that of Ugolino,

——" Padre, assái ci fia men doglia
Si tu mangi di noi :"——

[Where two persons die by the same stroke or accident, and there are no special circumstances in evidence from which it can be presumed that one died before the other; the law of England will draw a presumption from general circumstances, such as the comparative health, strength, age, (sex?) or even experience of the parties; see Sillick *v.* Booth, 1 Yo. & Co. 124 and 125, where most of the cases on this subject are collected.]

of survivorship on account of the degrees of robustness. (*a*)

Presumption as to death of a person unheard of.

The presumption by which a person who has been long unheard of, is considered dead, fixes the period of his death at seven years from the time when he was last known to be alive. (*b*)

General observations

It has been seen that all presumptions, except those *juris et de jure*, may be rebutted by any kind of legal evidence; and this chapter may here be closed, with the following sensible observations of Sir W. D. Evans: "The effect and weight of presumption cannot be influenced by any consideration more extensively than by the opportunity which the nature of the case affords to support or contradict it by direct testimony. A person who rests his case on the argument that certain circumstances, which he adduces, afford a presumption of the existence of a disputed fact, is not entitled to any attention whatever, if he cannot but be in a condition to give direct and positive evidence of the fact itself, supposing it to be true; and, on the other hand, presumption may be regarded as equivalent to absolute proof, when the party against whom it militates, cannot but be in a condition to defeat it, by positive testimony, if false. Where the inconsistency of the admitted facts with an opposite supposition to that which is inferred, is absolute and complete, so as to amount to a moral or physical impossibility, the term presumption is inapplicable, and it is a case of perfect proof. In other cases the existence of a mere possibility to the contrary may be so slight that the grounds of presumption will affect the mind with the same conviction as absolute demonstration." (*c*)

of Sir W. D. Evans, as to the effect and weight of presumption.

(*a*) Wright *v.* Netherwood, cited in Evans's App. to Pothier, p. 345. [Where a husband and wife perished in the same wreck, the Ecclesiastical Court held that it could not presume that he survived; but that there must be some evidence that he did so, to entitle his representatives to take administration, to property vested in the wife; see Herthwaite *v.* Powell, 1 Curt. 705.]

(*b*) Doe d. Frances *v.* Jesson, 6 East, 80, [*sed vide supra*, p. 483, n. (*a*), *et supra*, p. 250.]

(*c*) App. to Pothier, 340.

CHAPTER V. [377]

WHERE THE COURT REQUIRES FURTHER INFORMATION.

An Equity Judge has this most material advantage over the common law tribunal, that he is not bound to pronounce his decision at once, immediately after the trial. He may not only postpone his judgment, but if he finds the evidence unsatisfactory or defective, and is unable to elucidate the subject from his own resources, he may call for further information. Besides permitting, (which is the same thing as ordering,) the parties to procure additional evidence on particular points, he has the various powers—of examining witnesses for his own satisfaction—of referring the cause to a Master to make minute investigations for him—of sending an issue of disputed facts to a jury—or an issue of doubtful law, to a Court of common law. We will proceed to investigate these processes in their order.

Means adopted.

But a few preliminary observations may be made.

[And it will be, perhaps, as well in this place, to advert to the important Order of the 9th of May, 1839, No. 5; whereby, "In all cases in which it shall appear, that certain preliminary accounts and inquiries must be taken and made, before the rights and interests of the parties to the cause can be ascertained, or the questions therein arising can be determined; the plaintiff shall be at liberty, at any time after the defendant shall have appeared to the bill, to move the Court, on notice, that such inquiries and accounts, shall be made and taken: and an Order, referring it to the Master to make such inquiries, and take such accounts, shall thereupon be made, without prejudice to any question in the cause, if it shall appear to the Court, that the same will be beneficial to such, (if any) parties

Preliminary Accounts and Inquiries.

to the cause, as may not be competent to consent thereto; and that the same is consented to by such, (if any) of the defendants, as being competent to consent, have not put in their answers to the bill; and that the same is consented to by, or is proper to be made upon, the statements contained in the answers of, such, (if any) of the defendants as have answered the bill." (*a*)]

Inquiries —usual,

First,—there are certain inquiries which are granted as matter of right; upon a *primâ facie* case, (*b*) or a fundamental fact established: (*c*) thus, one who proves himself to be a

(*a*) [Sand. Ord. 852-3. And as to Interlocutory Orders and the Preliminary Inquiries directed by the Court before the Master, see further Dan. Ch. Pr., by Headlam, p. 980, *et seq.*

Prior to this Order, the practice, as to matters of account, was regulated by one of the 29th of June, 1618-19, Bacon, C., No. 50; Sand. Ord. 116. But such matters of account could not be entered into, under that Order, prior to the hearing of the cause, without consent of both parties; ibid. It would be tedious, and out of place, even if possible, to advert to every particular case, or class of cases, where such a reference is granted; suffice it, inquiries as to title, heirship, and next of kinship, and the like, are most commonly proceeded in under this Order.

But inquiries will not be directed, under this Order, where the object is to effect what is actually intended to be decided by the decree on the hearing; Lee *v.* Shaw, 4 Jur. 102.

They will, however, be ordered, if proper, although the cause be set down for hearing; Strother *v.* Dutton, 10 Sim. 288. An order may be made on petition, though more usually on motion; Flicks *v.* Shells, 4 Jur. 858. And in a suit for specific performance, under this order, a preliminary inquiry may be directed—"Whether the plaintiff has shown a good title and when first," without prejudice to the question of specific performance; Foxlow *v.* Amcoats, 4 Jur. 1054: and as to such inquiries, *vide* Dan. Ch. Pr., by H. 980, *et seq.*

The reference was refused, when it was doubtful, whether at the hearing the finding would be binding on the parties to the suit; Memtitzhagen *v.* Davis, 10 Sim. 289, S. P., Jacques *v.* Edwards, 22 Leg. Ob. 399. *Et vide infra.*

A defendant may file a supplemental bill to have the benefit of these inquiries; Upjohn *v.* Upjohn, 4 Beav. 246.

An inquiry as to a document, see in Hart *v.* Hart, 1 Hare, 1.

Inquiry as to next of kin, under the order for preliminary inquiries, was refused, in Topham *v.* Lightbody, 1 Hare, 289: where the title of the plaintiffs was not admitted.

As to inquiry whether all the persons of a particular class are already parties, see Hawkins *v.* Hawkins, 1 Hare, 543. Preliminary inquiries, under the order, were refused, in Curd *v.* Curd, 2 Hare, 116; Breese *v.* English, ibid. 118; Barrett *v.* Buck, ibid. 520: but as obviously nearly every case has to be determined on its own peculiar facts and merits, it is unnecessary to cite other such cases.

Although an order for the preliminary inquiries and accounts, has been obtained, in a suit for administering a testator's estate; yet the Court will not, on that account, restrain a creditor from suing the executor, at law. The order, however, does not prevent the parties from having the cause heard, before the Master has made his report; Teague *v.* Richards, 11 Sim. 64.

The Court, on an interlocutory application, will direct a reference or issue, to ascertain a fact, on which the title of the parties depends; but whether the parties ought to be bound, by the finding, at the hearing of the cause, *Quære?* Kent *v.* Burgess, 11 Sim. 361.]

(*b*) [Upon a bill to redeem, a *primâ facie* title is sufficient; nor will an issue be directed, though the title be complicated, if not contradicted; Pym *v.* Bowerman, 3 Swanst. 241.]

(*c*) [Where an allegation in the bill was admitted by one defendant, and denied by another; and the plaintiff proposed to waive his claim in respect thereof, which was opposed; an inquiry

creditor of a deceased, can demand a reference to the Master, to take an account of his property; (*a*) or an heir-at-law, a reference to a jury, to try the validity of a will. (*b*) Secondly,— the Court will sometimes investigate for itself, in despite of all the parties, a fact which transpires during the proceedings, but which it is their general interest to conceal. In such a case, Sir T. Plumer, M. R., said, "It has been argued, that the Court cannot take notice of the existence or nature of this collateral agreement, because, in the pleadings, nothing has been put in issue concerning it. Suppose a bill were filed for [378] the specific performance of a contract, for the purchase of a cargo of spirits, and it were to appear, in the course of the evidence, that the cargo was smuggled; the Court would not shut its eyes to a fact so presented to it, even though neither party had put the fact in issue. Here it comes out, that the contract stated in the bill is not the whole contract; and must I not know the whole contract, before I am called upon to decree specific performance? It comes out too, from the plaintiff's own witness, that the written contract was accompanied by another agreement, apparently, of an illegal nature, must not this point also be cleared up, before the Court can deal finally with the cause? The proper course would be to put these matters in a train of investigation, by directing an inquiry, &c." (*c*) Thirdly,—on a similar principle, and also from their anxiety to do perfect justice to all persons interested, the Courts have readily granted an inquiry, in respect of new facts, which show a possibility of interests not before them being affected; whether such interests belong to persons

—particular, as to facts not in the pleadings, or not put in issue;

—as to interests of persons not parties.

was directed, as to that fact; Crow *v.* Carleton, 5 Beav. 521.

Where matters are stated by the answer, which are not put in evidence, it is in the discretion of the Court to direct inquiries, as to them, before the Master; Connop *v.* Hayward, 1 Yo. & C. 33. A settled account stated in the answer, but not proved, is usually the subject of such an inquiry; ibid.]

(*a*) [But to obtain the usual decree, in a creditor's suit, it is not sufficient for the plaintiff to put in an acceptance of the testator, proved as an exhibit. *Quære*, whether any evidence should be given of the consideration; Keaton *v.* Lynch, 1 Yo. & C. 437.]

(*b*) [A case for an inquiry, and issue at law, as to a will, see Smith *v.* Spencer, 1 Yo. & C. 75. *Et vide supra*, p. 179.]

(*c*) Parker *v.* Whitby, T. & R. 371.

not before the Court, or have not been put in issue in the pleadings. (*a*)

No issues directed as to matters not put in issue.

The House of Lords, however, will sometimes interpose with more authority, and will prevent inquiries which the Chancellor has not ventured to refuse. Thus they decided, that no issue ought to be directed, to try a matter not fully put in issue in the cause; (*b*) and, therefore, where a bill was filed to take advantage of a forfeiture by marrying without consent, and an issue was directed to try whether the party was a papist or not, at the time of the marriage; the order was reversed, but the plaintiff was left at liberty to amend his bill. (*c*) So, when an issue had been granted to try the title of the Prebendaries of Westminster, to the college orchard, or common garden, on which the new dormitory was about to be built, the House of Lords, having "satisfactory proof that the common garden was the most convenient place for the scholars, with respect
[379] to their health, learning, and virtue," reversed the decree, and ordered that the building should be carried on, doing as little damage to the said garden as possible." (*d*)

(*a*) [And an inquiry, as to whether one who disclaimed had in his possession documents.] See Partridge *v.* Usborne, 6 Russ. 195.

[As to defendant, whether out of the jurisdiction, see Eades *v.* Harris, 1 Yo. & C. 230. And, (by the way,) as to what is sufficient *primâ facie* evidence, that a defendant *is* out of the jurisdiction, see Johnson *v.* Compton, 4 Sim 46.

These preliminary inquiries not unfrequently lead to others: thus, where, in an administration suit, it is referred to the Master to take an account of the debts, &c.; and claims are made against the estate, of such a nature that the Master cannot conveniently dispose of them; application must be made to the Court: which will either give special directions to the Master, to proceed; or direct a suit, action, or such other proceeding, as the exigency of the case may require; Lockhart *v.* Hardy, 5 Beav. 305.]

(*b*) [But an inquiry as to such a matter, may be directed; *vide* Connop *v.* Hayward, 1 Yo. & C. 33, *supra*, p. 490-1, n. (*c*).]

(*c*) Filkin *v.* Hill, 4 B. C. C. 640.

(*d*) Rochester Bp. of, *v.* Att. Gen., 4 B. P. C. 643. Accordingly it was built upon arches, leaving a walk underneath it.

SECTION I.

EXAMINATION BY THE COURT, *vivâ voce.* (*a*)

Power of Courts of Equity to examine *vivâ voce*, —to prove Exhibits;

THERE is an original authority, which our Courts have always asserted, but very seldom exercised, of calling on a witness to give his evidence in open Court. (*b*) In ordinary practice, the *vivâ voce* method of examination is never used, except for the formal proof of Exhibits, which we have before described, (*c*) and on emergencies arising from contempts. This

(*a*) [As contradistinguished from an examination before commissioners, the usual examination, before the Examiners of the Court, is what is usually meant by the term "examination in Court;" but both are equally distinct from the examination by the Court, here alluded to.]

(*b*) [And accordingly the following, (at the foot of the Orders of May, 1845,) of which see No 24, *supra*, p. 64, n. (*a*), is the *form of Subpœna to Testify, vivâ voce, in Court*,—or to testify before the Master:—

"VICTORIA, by the Grace of GOD, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

"To Greeting.

"We command you, [and every of you,] that, laying all other matters aside, and notwithstanding any excuse, you personally be and appear before our Lord High Chancellor, [*or* before his Lordship *or* Honor the Master of the Rolls, *or* before Mr. one of the Masters of our High Court of Chancery, *or* before E. F. *or* G. H., Commissioners named in a commission issued to them for that purpose,] at such time and place as the bearer hereof shall, by notice in writing, appoint, to testify the truth, according to your knowledge, in a certain suit now depending in our High Court of Chancery, wherein A. B. [and others, *or* another, are, *or*] is plaintiff, [*or* plaintiffs,] and C. D. [and others, *or* another, are, *or*] is defendant, [*or* defendants,] on the part of the. [*in case of subpœna duces tecum, add*, and that you then and there bring with you and produce, &c.] And hereof fail not at your peril.

"Witness ourself at Westminster, the day of in the year of our reign."—Sand. Ord. 1023. And note, the "Commissioners" here alluded to, are not the commissioners for examination of witnesses in the country; but Commissioners of the Great Seal. As to form of *subpœna*, in ordinary cases, &c., *vide supra*, p. 64, n. (*a*).]

(*c*) [*Vide supra*, p. 188, *et seq.* And now even that is partly superseded, by the power to use affidavits, given by an Order of the 26th of Aug. 1841, No. 43; Sand. Ord. 886. If, however, the old method be used; counsel usually asks, that the cause may be called on, in order that the witness, in Court, may testify.

No Will ever could, or can now, be proved as an Exhibit, in Court, *vivâ voce*; either in the Exchequer, Niblet *v* Daniel, 2 Fowl. 188; or in Chancery, Eade *v.* Lingard, 1 Atk. 293, S. P.: Eyles *v.* Ward, Moss. 379: because of the manifest necessity for proving the sanity of the testator, and compliance with the several requisites of the Statute of Frauds formerly, and the Statute of Wills now; and the consequent necessity for a power, on the part of the adverse parties, of cross-examination. It follows that wills cannot now be proved by affidavits, as some other exhibits may, under the late Order referred to. *Et vide supra*, p. 178, *et seq.*

The Judge of the Prerogative Court has no authority to examine witnesses, *vivâ voce*, upon the final hearing of a testamentary cause; Goodwin *v.* Gresler, 1 Ridgw., L. & S. 371.]

—in cases of alleged contempt of Court;

right of the Court of Chancery was formally recognised by the [Court of] King's Bench, in 1785, in the case of one Aylet: who complained, that after the hearing of his cause, he had been arrested on his way home. Mr. Dickens reports it thus; "The Lord Chancellor (Thurlow) directed the parties to go before one of the Masters of the Court, and make affidavit of the facts; but his Lordship being told the Masters had left the Office, directed me to administer the oath to the said Aylet; which I did,—'to answer truly to such questions as should be put to him,—and to speak the truth and nothing but the truth.'" Aylet having taken the above oath, the Lord Chancellor asked him, if he had been arrested before he had entered his house, &c. He was afterwards indicted for perjury, and his counsel (Mr. Erskine) questioned the competency of the Lord Chancellor; but, on Mr. Dickens's evidence, the objection was overruled. A motion was made in arrest of judgment, and Mr. Dickens continues, "Mr. Justice Ashurst wrote to me, to desire I would inform him what I took to be
[380] the practice. My answer was, that I ever understood it to be the practice of the Court to examine *vivâ voce*, upon a complaint of the kind alluded to;—The Court overruled the objection and allowed the competency." (*a*) It is common when persons are brought before the Court for not putting in their answers; and the following case (which indeed contained something of the emergency arising from a contempt,) was said to be quite according to the usual course. It was moved that a ward of the Court might be removed from the custody of her guardian, and placed with another, a lady, who kept a boarding-school. The Lord Chancellor (Cottenham) being satisfied that she ought to be removed, had not sufficient information respecting the lady proposed. He accordingly desired the infant's uncles to come with him into his private room, to be examined, *vivâ voce*, respecting the lady, and the propriety of placing the infant in her charge. (*b*)

Defendants not having put in their answers;

—inquiries as to a Ward of the Court.

(*a*) Moore *v.* Aylet, Dick. 643; and see Gascoygne's case, 14 Ves. 183; and Turner *v.* Burleigh, 19 Ves. 354.

(*b*) *Ex parte* Bates, an infant, 30 Jan. 1836, MS. [Where we observe, the testimony of the uncles was clearly in the nature of *vivâ voce* evidence; and clearly distinguishable in kind from the

Other instances.

Of examinations *vivâ voce*, which were neither for the proving of exhibits, nor concerning contempts, [or wards,] a few cases have occurred. One, in 1727, is briefly reported thus; "Liberty given to examine a witness *vivâ voce* after a publication, as to a particular fact, and the defendant to cross-examine him." (*a*) In *Bishop* v. *Church*, (*b*) Lord Hardwicke said, "I should be glad to know what Bishop answered to Mr. Clive, the defendant's solicitor, on his application. He has been examined for the defendants, and his answer is general, that he could not prevail upon them to do it: so that I will decree Clive to be examined on interrogatories as to that, unless the plaintiff opposes it; for in that case, I will give my determination on the evidence before me. The Court has sometimes directed a witness to attend personally, where they have had a doubt." (*c*) And the same learned Judge, in the same Term, when three [381] persons had each sworn contrary affidavits, (*d*) asserted that it was the general rule, in such cases, that they should be produced in Court, "a personal examination being required." (*e*) But that he considered this a practice which ought not to be extended, upon slight considerations, urged by the party, is plain, from his answer in the case of *Graves* v. *Budgel*. (*f*) The defendant (Eustace Budgel, a gentleman well known in the history of our literature, for his eccentric talents and his tragic end,) moved that certain witnesses, who were to prove exhibits,

answers of a married woman, on her judicial examination, apart from her husband; an examination, which, though called private, usually takes place in open Court; and yet being solely with a view to satisfy the Court, (or Judge rather,) it is generally inaudible to others.

It may here be observed also, that as the Court does not require affidavits even, it must be content with mere *vivâ voce* information, to induce an order that a ward shall not be taken out of the jurisdiction, (even to Scotland only); as in Demaunevill v. D., 10 Ves. 56.]

(*a*) Gage v. Hunter, Dick. 49.

(*b*) 2 Ves. 106. In Marsh v. Walker, Rep. t. Finch, 416, a witness who had been examined by both parties, was examined *vivâ voce*.

And witnesses were so examined, by consent, in Holles v. Carr, in 1676, reported in 3 Swanst. 638.

(*c*) In Banks v. Farques, *i. e.* Farquharson, Ambl. 145; on motion to prove the handwriting of the attesting witness to an exhibit after publication, Lord Hardwicke is reported to have said, "It was often granted to examine a witness *vivâ voce* during the hearing, as in Warde v. Blunt, and he saw no difference in the case."

[And see Ellis v. Deane, 3 Moll. 637.]

(*d*) [See observations of Lord Langdale, M. R., on the discrepancies appearing in certain affidavits, drawn for, and sworn by, illiterate and ignorant persons, in Johnston v. Todd, 5 Beav. 597. *Et vide post*, Affidavits.]

(*e*) *Ex parte*, Lord, 2 Ves. 26.

(*f*) 4 Atk. 444.

might be further examined *viva voce* at the hearing. One ground was, "that the exhibits were alleged forgeries," the other, "the ill state of health of the defendant, disabling him to go down into the country to attend the commission." It was also, "prayed in honour of the defendant, he having denied the receipts." But the Lord Chancellor said, I cannot allow this question: the constant and established proceedings of this Court, are upon written evidence, like the proceedings upon the Civil and Canon law. This is the course of the Court, and the course of the Court is the law of the Court; and though there are cases of witnesses being so examined, yet they have been allowed but sparingly, and only after publication, where doubts have appeared in the depositions; and the examination has been to clear such doubts and inform the conscience of the Court. (*a*) There never was a case where witnesses have been allowed to be examined at large at the hearing; and though it might be desirable to allow this, yet the fixed and settled proceedings of the Court cannot be broke through for it."

Other Judges have expressed in stronger language the inconvenience which they felt in being, virtually, precluded from examining *viva voce*; (*b*) and as the question of enlarging the
[382] powers of Equity Judges, in that respect, has been frequently agitated, the following passage, from the Report of the Chancery Commission, may not be considered as misplaced.

Report of the Chancery Commissioners.

"An objection that has been often made to the present mode of taking proofs in the Court of Chancery, is,—that it deprives the Judge, who is to decide the cause, of the benefit of an oral examination, and an observation of the demeanor and conduct of the witnesses; but this objection cannot be removed, because it is obviously impossible for the Lord Chancellor, Master of the Rolls, and Vice Chancellor, to take

(*a*) [The practice of a further examination, or even re-examination, of witnesses—"*ubi judex* dubitat, *ad informandum conscientiam judicis*," as alluded to in an Order of the 29th of Jan. 1618 19, Bacon, C., No. 74, (Sand. Ord. 119,) and in Fish *v.* Mountford, Carey, 27, and Manley *v.* Simcoti, Ibid. 58, seems practically obsolete. *Et vide supra*, p. 202.]

(*b*) As Lord Alvanley, M. R., in Binford *v.* Dommett, 4 Ves. 762; Lord Erskine speaks of the written examination as a "frail and imperfect mode of examining into facts;" White *v.* Wilson, 19 Ves. 31.

all examinations in person. But if it were otherwise, it would be necessary, either to have a Court of Chancery perpetually going the circuits of the country,—or to bring all witnesses to London, which would be attended with serious inconvenience and heavy expense.

"Another objection is, that the parties have not the opportunity of being present by their counsel, to question and cross-examine the witnesses *vivâ voce*. But we very much doubt whether any alteration, in this respect, could be introduced, which would, upon the whole, operate as an improvement.

"In the first place, such an alteration would increase the costs of a suit; and the time employed would also be lengthened, by objections taken, and by arguments raised, upon points of evidence: and a Judge would be required of sufficient weight and authority to control the course of examination within legal and proper limits. And, even if such a Judge were provided, the full benefit which results from the *vivâ voce* examination, before a Judge and Jury, in a Court of Law, could not be obtained from oral examinations in the Court of Chancery, inasmuch as such examinations could not be taken in the presence of the Judge, who is to decide the cause. In cases of much doubt upon the facts, resort must still be had to the trial of issues before a jury, which course is now taken in all such cases, where that mode of trial is properly required.

"If we could feel satisfied that the increase of delay and expense, which would probably follow from having open and public examination, conducted by counsel, could lead to any material saving of either, in the ultimate decision of a cause, we should be inclined to recommend the experiment; but we do not think that this would be the case." (*a*) [383]

Practice in Bankruptcy;

Yet the experiment of combining the two modes of examination has been so far successful, in the Bankruptcy Court, that the subject may well demand the further consideration of the

(*a*) Rep. of Chan. Com. p. 14; and see the observations of Sir W. Grant, M. R., in Lake v. Skinner, 1 J. & W. 9.

As to Courts of Equity.

Legislature. (*a*) There is certainly a feeling now in our Courts that some attempt of the sort might, with caution, be ventured upon. In a case in the Court of Exchequer (the Equity side) (*b*), Mr. Baron Alderson used the following language; "There is a class of cases in which the imperfect mode of taking parol evidence in this Court places us in a situation of no ordinary difficulty in ascertaining facts. No one can read the depositions taken in a Court of Equity, without being satisfied that it is only on tolerably clear cases of facts that they can afford real information. Where the individual credibility of the witness becomes important, which it always does where there is contradictory testimony, the Court must direct an issue, because in no other way can this be properly weighed and determined. (*c*) What is really wanted is, the oral examination and cross-examination of the witnesses; and the assistance of a jury is, as it seems to me, only incidental to this important object. I for one should be quite as well, and, perhaps, better satisfied, if, instead of directing issues, the trial of which often miscarries, and causes infinite expense to the parties, it were competent to this Court in such cases, either to direct an issue, or to require the oral examination of witnesses to take place before itself, on an issue previously defined. The conscience of the Court, I should apprehend, would quite as well be satisfied by its own immediate conclusion on the evidence, as it could be mediately through the opinion of the jury; who, in cases of this description, are sometimes not altogether free from prejudice." (*d*)

Observations of Mr. Baron Alderson,

on the want of an oral examination of witnesses,

by which the Court might satisfy its conscience;

And in a cause which was heard before the same learned [384] Judge shortly afterwards, (*e*) he interrupted the reply, saying,

(*a*) [As to examinations *vivâ voce* in the Court of Bankruptcy, see some cases in Ch. Eq. Index, 2nd edit., Practice, Evidence, Examination *vivâ voce*, p. 1419. The Court of Review may take evidence *vivâ voce*, or upon affidavit, before a Judge or a Master, see stat. 1 & 2 Wm. 4, c. 56, s. 38. The late case of Lord Huntingtower's bankruptcy was an instance.]

(*b*) Barnes *v.* Stuart, 1 Yo. & C. 139.

(*c*) [And why so, *vide supra*, p. 5, n. (*b*).]

(*d*) [And the very learned Judge who made these observations, as one who has adorned the Bench in Equity as well as at Law, may, without doubt, be deemed most competent to give such an opinion; but the difficulty, for (amongst others) the reasons assigned by the Commissioners in their Report, (cited above,) seems almost insuperable.]

(*e*) Margareson *v.* Saxton, 1 Yo. & C. 532. It may be added that the 69th [and 72nd] of Lord Lyndhurst's Orders [Sand. Ord. 727] empower the *Master*

"My difficulty is to decide this question without an examination of the parties. Is there any way in which I could be relieved from that difficulty? Upon the evidence as it stands upon the depositions and documents, it is not a voluntary conveyance. But I cannot shut my eyes to the fact, that the Judge, who has had an opportunity of seeing the parties, came to an opposite conclusion. Perhaps, if I had the same means, I should come to the same conclusion. I cannot send such a case as this to a jury; for the sum in dispute would be consumed in the expense of such an inquiry. (*a*) I will take this opportunity of expressing an opinion which I have already expressed, that I wish I had the power of examining witnesses, in this Court. If the parties by consent will give me that power, which I wish all Courts of Equity had, I will examine them." It was then arranged, that the cause should stand over, for the purpose of examining the parties *vivâ voce;* but this arrangement was afterwards abandoned.

as to the difficulties resulting therefrom,

and the costs of an issue tried at law.

If, by strictly limiting and defining the circumstances, under which permission should be given to examine in chief, or to cross-examine *vivâ voce* in open Court, the increase of business could be kept under any sort of control; and there were a probability that the addition of one, or perhaps two, more Equity Judges would be sufficient; then it might be worth while, to try the experiment. The evil of thus increasing our tribunals, would not be excessive, nor irremediable; and there would certainly be great gain to the suitors. (*b*)

Suggestions to meet the difficulties.

at his discretion to examine any witness, [creditor, &c.] *vivâ voce;* and gives directions how the evidence shall be preserved. And that the commissioners named in a commission for a partition may examine witnesses, under the commission, *orè tenus*, or take their depositions in writing, as they think fit, see Meers *v.* Stourton Lord, Dick. 21.

(*a*) [This it is, induces the Court, not unfrequently, to rest satisfied with what seems insufficient evidence.]

(*b*) [Two more Equity Judges have been added, since Mr. Gresley made this suggestion; but this experiment, however, has not yet been tried.]

[385]
Suggestions of counsel, solicitors, &c., in reply to verbal inquiries of the Judge, in Court.

There is another circumstance which ought not to be entirely overlooked, though it is in itself so totally irregular, that little can be said upon it. Many Judges, in endeavouring to make themselves masters of the bearings of a cause, will ask a multitude of verbal questions, to which verbal answers are given by the counsel or solicitors. Important points of information are often thus introduced while the opposite party feels a repugnance to objecting, through fear of being considered captious. (*a*) Instances are of almost daily occurrence. To mention one, which passed while the author was in Court,—In *Macdougal* v. *Elliot*, the question being the claim of a modus for certain houses and gardens; the learned Judge asked if the houses for which the claim of a modus was set up, included *all* the houses in the parish. His object was obviously to ascertain whether it ought to be considered as a district modus; and the answer was given by a solicitor, on the information of a by-stander, without being challenged. (*b*)

(*a*) [Whilst the fear of being considered presumptuous, and impudent, precludes the Editor of this Edition from making several further observations, similar to those made by Mr. Gresley, and induces him to omit personal reference to the learned Judges.

But the reader may, perhaps usefully, refer to Bacon's inimitable Essay of Judicature, and then, while in Court, make his own private observations.]

(*b*) Exch., 7th Dec. 1832, MS.

SECTION II.

REFERENCE TO A MASTER.

Form of a decree, of reference.

THE common form of the minutes for the ordering part of the Decree, when a reference is made to a Master, is as follows;

"It is ordered, that it be referred to the Master in rotation "to inquire and state to the Court, &c. And for the better "discovery of the matters aforesaid, the parties are to produce, "before the said Master, upon oath, all deeds, (or books,) "papers, and writings, in their custody or power, relating "thereto, (*a*) and are to be examined, (*b*) upon interroga- "tories, (*c*) as the said Master shall direct." (*d*)

(*a*) [As to the effect of this part of the Order, see Shirley *v.* Ferrers, 1 Myl. & C. 304. That it should be inserted in an order to inquire as to title, see Winterbotham *v.* Ingram, 9 Sim. 654. In a suit for having partnership accounts taken, the plaintiff, although appointed receiver in the cause, cannot, before decree, be ordered to produce books, &c. for inspection by the defendant; nor can any party, except by consent, be compelled to produce, except before the officer of the Court; Maund *v.* Allies, 4 Myl. & Cr. 503.]

(*b*) [Nor does stat. 6 & 7 Vict. c. 85, alter this, further than to make interest, which was before an objection to competency, now one as to credibility only, *vide supra*, p. 326-7.

Where decree was enrolled, and no order to examine a party, the Court would not order him to be examined, for the discovery of deeds; Macklow *v.* Wilmot, 2 Ch. Rep. 18.]

(*c*) [As to interrogatories, and as to commissions when necessary, *vide infra.*]

(*d*) See Seton on Decrees, p. 11; a work which contains a great deal of valuable matter, on the subject of the present section. [That no witness is to be examined in Court after the day of publication, though sworn before, see an Order of 17th of Nov. 1635, Coventry, K., Sand. Ord. 178; and S. P. Jenkinson *v.* Pepys, 3 Anst. 835, and an Order of 22nd of May, 1661, Clarendon, C., Sand. Ord. 301.

This was the general rule; but to provide for such cases as might require, and fairly admit of, further examination of witnesses, it became usual to have further inquiries before the Master. And accordingly, an Order of the 27th of Feb. 1666-7, Clarendon, C., mentions that "the Masters in Chancery upon references to them upon hearings for the ease of the Court in stating of accounts and other like matters, have of late been armed with commissions to examine witnesses and power to direct commissions into the country, if they saw cause," &c. This order then adverts to the inconveniences attending the then practice, and mentions the danger that "clients will be encouraged more frequently to neglect or forbear to make their full proofs although they might and ought to do it before publication, purposely to take advantage of such latter proofs, which may occasion the lengthening out of causes, to the great charge and delay of the suitors in this Court." And it was therefore ORDERED, "That for the future all par-

[386]

Mode of proceeding.

Master to regulate the manner of the execution of the decree or order.

The proceedings under one of these decrees, as regulated by the Orders of the 3rd of April, 1828, (Lyndhurst, C.) beginning from No. 48, (*a*) require our particular attention; No. 51 is, "That at the time appointed for considering the matter of the said Decree or Order, (*b*) the Master shall proceed to regulate, as far as may be, the manner of its execution; as for example, to state what parties are entitled to attend future proceedings, to direct the necessary advertisements, and to point out which of the several proceedings may be properly going on *pari passu*, and as to what particular matters interrogatories for the examination of the parties appear to be necessary, and whether the matters requiring evidence shall be proved by affidavit, (*c*) or by examination of witnesses; (*d*) and in the latter case, if necessary, to issue his certificate for a commission; (*e*) and if the Master shall think it expedient so to do, he shall then fix a certain time or certain times, within which the parties are to take any certain proceeding or proceedings before him." Mr. Sidney Smith speaks of the great practical utility of this Order, in all except the very simple references, where a

ties concerned do at their peril as much as in them lies, make their full proof before publication passeth in the cause. But if upon any such reference, the Master shall find any particular points or circumstances needful to be proved to ground his report upon, which are not fully proved, nor could properly be examined to before the hearing of the cause, he shall then direct the parties to draw interrogatories to such points or circumstances only and examine thereupon, in Court by the examiner if the witnesses shall reside within ten miles of London, but if farther off, and the parties desire it, he may direct a commission into the country, which shall be made out by the six clerks. Which said commission and the depositions thereby taken, shall be returned unopened to the respective six clerks, which ought to have the keeping thereof, and publication to pass according to the course of the Court in such cases." Sand. Ord. 320-1. On this order, it would seem, the practice thenceforward was grounded, until the several alterations were made to which (in their respective places and order) we shall hereafter advert; and see Lord Alvanley's Observations in Parkinson *v.* Ingram, 3 Ves. 607, set forth fully in the text below.]

(*a*) [See Sand. Ord. 723, *et seq.*] The foundation of the right of the Masters to examine, and the whole practice, may be found, investigated, with much research, by Lord Alvanley, M. R., in Parkinson *v.* Ingram, 3 Ves. 603. [And see Sand. Ord. Index, *voce* Master, Master Extraordinary, and Master of the Rolls.]

(*b*) [On a reference under an Order the Master has the same power as on one under a Decree; Woodroffe *v.* Titterton, 8 Sim. 238.]

(*c*) [As to Affidavits in general, see a subsequent chapter. Where see an Order of 10th June, 1595; whereby the Court expressed its dislike of affidavits "not taken by virtue of any order of this Court;" and the Master was expressly prohibited from using such; Sand. Ord. 66, *et infra.*]

(*d*) [As to this, *vide infra.*]

(*e*) [As to this, *vide infra*, and, if it seem requisite, the Court will direct a commission to examine witnesses abroad.]

"warrant to consider the decree," is superfluous; "The Solicitors of the parties all meet together before the Master; the mode of prosecuting the decree is arranged; if an objection is raised to the attendance of any party, it is decided before any expense has been incurred; the number of parties who are to be served on the several proceedings is canvassed and fixed, and certain times are limited for the several proceedings; and suggestions and mutual communications pass between the solicitors." (*a*) It is essential that all necessary arrangements should be decided upon at this meeting, for what he is especially authorized to do then, cannot, if omitted, be supplied afterwards; but "the practice must remain as it was before the issuing of the Orders." (*b*)

Preliminary meeting of the solicitors,

at which some arrangements must be definitively made.

Sometimes the Court itself directs the mode of the investigation, as where the examination is ordered to be conducted upon interrogatories, to be settled by the Master. Certain instances will be spoken of in the latter part of this section.

[387]

The ordinary investigation of facts carried on before the Master, is simply an arrangement for the sake of convenience. The Judge, who hears the cause, has not time to pay his undivided attention to the *minutiæ* of every suit; and is, therefore, content to adopt the opinion of an officer, delegated to look into the proofs. (*c*) With a further view to convenience, and also to the saving of expense, it became allowable, and customary, to defer the proving of various matters until a decree had been obtained, (*d*) for then the topics essential to the questions which the Judge contemplates deciding, are pointed out with certainty and precision.

Ordinary inquiries.

Matters never proved before a decree.

Consequently, every sort of evidence which can be used at the hearing, may also be used before the Master. (*e*) There is

All evidence admissible which can be used at hearing.

(*a*) 2 Chan. Prac. 90.

(*b*) Gibbs *v.* Payne, 4 Sim. 554; whether he had been actually invested with the power or not was left undecided. [As to exhibits, see an Order of the 3rd of April, 1828, No. 60, cited fully below, p. 510, in text.]

(*c*) [As to matters of fact merely, as reported to him, the report being either not excepted to at all or amended after exceptions.]

(*d*) [Especially all Matters of Account; as to which evidence (it is said) ought not to be entered into at all before the hearing; Law *v.* Hunter, 1 Russ. 109; that is now, the first hearing, on the motion for the reference to the Master.]

(*e*) [A reference under the stat. 7 Geo. 2, c. 30, must proceed upon admission of the principal and interest

this slight difference to be noted, arising from the nature of the tribunal. Some kinds of evidence require to be mentioned to the Court, some time before the trial, on motion, (*a*) lest, from the want of sufficient opportunity for disputing their admissibility, irreparable injury should be done, by an ill-grounded decision; but for the same kinds of evidence before the Master, this motion is unnecessary. Thus, where the Master refused to admit depositions in a former cause, unless an Order of the Court was obtained for that purpose, (*b*) Lord Hardwicke "refused it," because he would not put persons to unnecessary expense by such applications; and said, "the reason why you cannot read such evidence at the hearing, without an Order, is, that every cause before the Court is an entire proceeding, and determined for the most part in one day, so that unless you have a previous Order, it is a fatal exception; but before a Master, parties go on *de die in diem*, and he has an opportunity of judging, whether he ought to admit the depositions to be read, or if the Master should be mistaken, you may take exceptions, and, therefore, there is no occasion for the Court to make an Order in it." (*c*)

Even such as then required an Order;

an Order to admit such is not necessary.

Distinction.

[388]

State of Facts.

In proceeding to his investigation the Master generally requires the party, whose business it is to prove the subject of the reference, to draw up [and lay before him, a document called] a State of Facts, that is, a statement of what he expects, or proposes, to substantiate. (*d*) If necessary, a counter-statement is required from the opposing party, (*e*) "as where the

due upon the mortgage; and the Master cannot admit evidence; Hewson *v.* Hewson, 4 Ves. 105.]

(*a*) *Vide supra*, p. 194, *et seq.* Evidence allowed on Special Order.]

(*b*) [Respecting which, *vide supra*, p. 194. In one case, the Court, under the circumstances, refused a prospective direction, (in an order of reference) to admit certain books, not being legal evidence; though such order usual in a fair case, (as when from want of notice of an adverse claim a strict account cannot be given) merely giving liberty to apply upon any question of evidence; Lupton *v.* White, 15 Ves. 432.]

(*c*) Anon. 3 Atk. 524. [Yet see Leebine *v.* Green, 2 Ves. 379, where an order is proper.]

(*d*) [Which, if within the scope of the order, the Master cannot object to; although the points to be proved may have been in issue, and might have proved; Hough *v.* Williams, 3 Bro. C. C. 190; O'Niel *v.* Harnill, 1 Hog. 183.]

(*e*) [Where a party takes his State of Facts into the Master's office, and obtains leave to examine witnesses, and completes the examination, his opponent's State of Facts may, at any time, before publication, be amended, by leave of the Master; Nelson *v.* Bridport Lord, 6 Beav. 295.]

plaintiff's State of Facts throws an affirmative issue on the defendant. (*a*) This preliminary is not, however, essential. When it has been omitted, a party will be held to have waived the objection if he allowed it to pass unnoticed at the time. (*b*) Upon the State of Facts they proceed to evidence according to the mode which has been fixed upon at the meeting on the warrant to consider the decree." (*c*)

Entering into evidence.

Evidence is presented to the mind of the Master, as to that of the Judge, in a variety of different modes.

Modes of presenting evidence to the Master.

His Judicial cognizance is the same; (*d*) and in one additional province is turned to a most important account. Every kind of evidence that has been already used in the cause, that is to say, put in, and entered as read, may be produced before the Master, without further preliminary. (*e*) It must, however, be employed for and against the proper parties.

His judicial cognizance;

Inspection (*f*) is much more habitual on the part of the Master than of the Court, for the obvious reason that leisure, privacy, and, indeed, every facility for the adoption of that method of ascertaining truth, lies within his easy reach.

inspection;

The Master may act upon Admissions and Waivers. (*g*) There is an old Order (of the 28th of Oct. 1696, Lord Somers, K.) that where "upon a reference any matter of fact shall be admitted, or agreed to, before the Master, he shall take memorandum of the fact so admitted or agreed to, in his book of minutes; and the party so admitting or agreeing, shall subscribe such minutes or memorandum in the presence of the Master; after which such subscription shall be binding and conclusive to the party on whose behalf the same was so subscribed, so as that the other side shall not be put to any further proof to make good the same." (*h*) A Master by his report certified that the defendant had submitted to do a certain act; to which the defendant excepted, insisting that

the use of admissions and waivers;

the existence of such to be

[389]

(*a*) Willan *v.* Willan, 19 Ves. 598.
(*b*) Ibid. 600; [S. C. Coop. 291, and see Dow. 274.]
(*c*) [*Ut vide supra*, p. 503.]
(*d*) [As to which, in general, *vide supra*, p. 395, *et seq.*]
(*e*) [See Smith *v.* Atkins, 11 Ves. 564, S. P. *ex parte* Jackson, 1 Rose, 35.]
(*f*) [As to which, *vide supra*, p. 449, *et seq.*]
(*g*) [As to which, *vide supra*, p. 9, *et seq.* *Et vide etiam*, p. 456, *et seq.*]
(*h*) Bea. Ord. 304, [Sand. Ord. 404.]

denied on affidavit at least, to falsify the report.

he had made no such submission. The Lord Chancellor (Parker) "resolved that by means of the report the proof was thrown upon the defendant, whose affidavit, at least, was necessary to falsify what had been certified; for though there was no reason that the Master's report should be arbitrary and conclusive upon any one, yet it shall be presumed *primâ facie* to be true, and it rests on the other side to show the contrary." (*a*)

Examination of a party to the suit;

A party to the suit may be examined, in a mode described in the latter part of this section; and his evidence becomes equivalent to admissions in the pleadings. (*b*)

(*a*) Allen *v.* Pendlebury, 3 P. Wms. 142, note.

(*b*) [As to which, *vide supra*, p. 456. By an Order of the 29th of Jan. 1618-19, Bacon, C., No. 70, a defendant was not to be examined "except in some very special case, by express order of Court, to sift out some fraud or practice pregnantly appearing to the Court, or otherwise, on plaintiff's offer to be concluded by the answer of defendant, without any liberty to disprove such answer, or impeach him after of perjury." Sand. Ord. 118. But on this subject, *vide supra*, p. 243, and note, this was not pointed at the examination of a party as a witness only.

But by an Order of the 3rd of April, 1828, Lyndhurst, C., No. 61, all parties accounting before the Master to bring in their accounts, &c., "and any of the other parties who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party upon interrogatories, as the Master shall direct." Sand. Ord. 725. And by one of the same Orders, No. 72, the Master may examine a creditor or other claimant, either upon written interrogatories or *vivâ voce*, in manner therein provided. Sand. Ord. 727.

On a bill to be relieved against bonds alleged to have been obtained by fraud and imposition, all parties were ordered to be examined. Plaintiff being a weak man, and easily prevailed on to say, or admit, anything; the Court directed, that in case interrogatories should be exhibited against him by the defendant, the Master should take care to examine him in person, so that no advantage should be taken of his weakness; Piddock *v.* Brown, 3 P. Wms. 288. An order that a defendant already examined and cross-examined should be re-examined, but "as the Master should think reasonable," see in Purcell *v.* M'Namara, 17 Ves. 434.

A defendant may obtain an order, as of course, to examine a co-defendant, after a decree "saving just exceptions." Van *v.* Corpe, 3 Myl. & K. 269. (where the saving was the exception as to interest, &c. to which the witness was open, prior to the late statute.)

An order to examine a co-defendant, as a witness, may be obtained *ex parte* by a defendant, as well after as before a decree. And the Court gives credit to the allegation, upon which the order is founded; that the defendant proposed to be examined is not interested; and the question whether he is or not can only be raised when the deposition of the witness is objected to; Paris *v.* Hughes, 1 Keen, 1. And now (by stat. 6 & 7 Vict. c. 85, *supra*, p. 326,) not at all, as to suits begun since the 22nd of Aug. 1843, *vide supra*, p. 326-7.

But a plaintiff having filed replication to the answer of a defendant, (and thus given him the lie as it were,) cannot be allowed to examine him as a witness; Rose *v.* Clarke, 1 Yo. & C. 534, where, however, it was a *quære* only; but see Holmes *v.* Arundel, Corp. of, 4 Beav. 155, where an order to examine such a defendant was held to be irregular, whether he was to be considered a party or not; and see Baker *v.* Thurnall, 6 Beav. 333, where leave was refused.

Where one made a defendant disclaims all right; plaintiff cannot read his evidence, as proof of his own right, to the prejudice of another defendant; Hill *v.* Adams, 2 Atk. 39.]

When it is necessary to produce witnesses, (*a*) one who has been examined before in the suit may be examined, by order of the Court, (*b*) on interrogatories settled by the Master, of which we shall speak presently. (*c*) [These and] fresh witnesses may give their evidence before the Master either *vivâ voce*,— or before the Examiner,—or before a Commissioner.

of a witness examined before,

and of fresh witnesses, in three ways;

The first of these modes is authorized by an Order of the 3rd of April, 1828, Lyndhurst, C., No. 69, "That the Master shall have power, at his discretion, to examine any witness *vivâ voce*; (*d*) and in such case the *subpœna* for the attendance of the witness shall, upon a note from the Master, be issued from the Subpœna-office; (*e*) and that the evidence upon such *vivâ voce* examination shall be taken down by the Master, or by the Master's Clerk in his presence, and preserved in the Master's Office, in order that the same may be used by the Court if necessary." (*f*)

I.—*vivâ voce*;

how such an examination taken, and preserved.

This is not a new power; it was formerly doubted by some even of the Masters themselves, but established after due con-

(*a*) [Protection of witnesses extends to them going to and returning from the Masters' Offices; Sidgier *v.* Birch, 9 Ves. 69.]

(*b*) [England *v.* Downs, 6 Beav. 279. *Et vide supra*, p. 136. The party moving must state the names of the witnesses he wishes to have examined again; Jones *v.* Thomas, 3 Yo. & C. 227.

Where a witness who has been examined in the cause is to be examined again before the Master, the general rule restricts his examination to points upon which he has not been previously examined; but, under special circumstances, a witness ordered to be examined by the Master *vivâ voce* and without this restriction, in Rowley *v.* Adams, 4 Myl. & K. 543, and see Barker *v.* Greenwood, 3 Yo. & C. 393.

A witness examined before the hearing may be examined before the Master, for the other side, without leave of the Court; Mitford *v.* Peters, 8 Sim. 630.

An order for re-examination after decree, of witnesses examined already in chief, was held properly drawn up, in terms of the notice of motion; Manson *v.* Burton, 1 Yo. & C., N. S. 647.

A witness called by the plaintiff and cross-examined by the defendant, before the hearing, on a point not then in issue, in the cause, was allowed to be examined again by the defendant, on the same point, when the issue was raised before the Master, under the decree; Whitaker *v.* Wright, 2 Hare, 321.

A witness was examined for the plaintiff, and cross-examined, by the defendant, on other matters; held, that his further evidence, in behalf of the defendant, could not be received, upon an inquiry before the Master, except by order of the Court; England *v.* Downs, 6 Beav. 281. Further as to evidence allowed on special order, *vide supra*, p. 194, *et seq.*]

(*c*) [Of interrogatories generally, *vide supra*, p. 54, *et seq.*]

(*d*) [This discretion, however, cannot be exercised after issuing the warrant, on preparing his report; Trotter *v.* Trotter, 5 Sim. 383. Nor after examination *vivâ voce* may the Master receive affidavits, to supply defects in proof; Hopkinson *v.* Roe, 1 Beav. 182.]

(*e*) [As to the Form of this *subpœnâ*, *vide supra*, p. 493, n. (*a*).]

(*f*) [Sand. Ord. 727.]

sideration by Lords Loughborough and Alvanley in the case of *Parkinson* v. *Ingram.* (*a*)

II.—before the Examiner;

In that case the propriety of the witnesses' being sent by the Master to the Examiner was discussed: and the following is an extract from Lord Alvanley's judgment. "The Masters have been in the habit of examining after a decree: but there was an express authority by the decree, I apprehend, that the [390] Master was to be armed with a commission to examine witnesses, and to direct the same into the country, if he thinks fit; and it was not of course: but regularly the Examiner was to examine such witnesses as the Master thought necessary; unless the Master certified that a commission was necessary. Lord Clarendon, thinking this an improper insertion in the decree, made an Order of 27 Feb. 1666-7, (*b*) the recital in which certainly shows that a preference ought to be given to the Examiner, on account of the regular mode of preserving the examinations. (*c*) Notwithstanding that Order, it appears, by an Order of 23rd June, 1688, they had begun again to examine in the Master's Office. (*d*) It arose from the Courts not continuing to observe that Order. I have found three decrees in the time of King James II., in which that direction, that the Master is to be armed with a Commission to examine, &c., is inserted. I believe it was always inserted, if desired; as it constantly was in the Court of Exchequer. Mr. Dickins has furnished me with a decree in the reign of King William III., in which the only difference is, that the Master is to be at liberty to examine witnesses. (*e*) No other decrees are to be found: but the constant practice is for the Masters to examine where they see fit, and if they see cause to direct a commission to the country, they do not direct it, but they certify that it is necessary. Then arose the dispute, whether those depositions taken in the country should go into the

(*a*) 3 Ves. 607, [and see also *ex parte* Sanderson, 2 Cox, 196.]

(*b*) [See this old Order cited, *supra*, p. 501, n. (*d*); Bea. Ord. 219; Sand. Ord. 321. Before the hearing no evidence can be gone into, as to matters of account only; see Law v. Hunter, 1 Russ. 100. *Et vide supra*, p. 503.]

(*c*) [See Sand. Ord. 320-1.]

(*d*) Bea. Ord. 285, [Sand. Ord. 382.]

(*e*) [An Order, in the time of Wm. 3, viz. of the 19th of Jan. 1694-5, alludes to the depositions used before the Master, see Sand. Ord. 403.]

Master's Office, or be filed in the Six Clerks' Office; and it was determined by the Court, and the constant practice is, that they shall be kept in the latter. As to the depositions taken before the Masters in their offices, their habit is to keep them there." (*a*) He then states the question before them to be "whether this constant practice was not sufficient evidence that the Court did give them authority," and he "concurs with the Lord Chancellor that the Master may, if he thinks fit, examine witnesses after a decree. At the same time," he adds, "the practice to examine before the Master's clerk can never be proper." (*b*) [391]

III.—by a Commission;

With respect to the Commission to examine witnesses, Lord Eldon uses very similar language. "In Chancery, the old course was the same as that of the Court of Exchequer, the Duchy Court of Lancaster, and other Courts of Equity; to insert in the decree that the Master is armed with a power to examine witnesses: that, however," he continues, "is not now inserted in the decrees of this Court; but instead of that, the Master may certify that a commission is necessary." (*c*) When the Master has certified the necessity of a commission, (*d*) it is granted on a motion of course, and is not different from those which precede the decree. So a motion is the proper proceeding to discharge an order for a commission granted on a Master's certificate. (*e*)

granted on motion.

Motion to discharge the order.

Publication

Publication of evidence, thus taken before the Master, is

(*a*) [And see Drake *v.* Woodford, 1 Smith, 116.]

(*b*) [Parkinson *v.* Ingram, 3 Ves. 607. But see the Order of 3rd April, 1828, No. 69, *supra*, p. 507, regulating the clerk's duty.]

(*c*) Sandford *v.* Bidduph, 9 Ves. 36; [Bearcroft *v.* Berkeley, 2 Cox, 108, cited below; and see Parkinson *v.* Ingram, 3 Ves. 607, *ut supra*, p. 508. And, by an Order, of the 3rd of April, 1828, No. 51, "if necessary issue his certificate for a Commission;" Sand. Ord. 723.

Whenever it is necessary to ascertain a fact respecting which a reference has been made to the Master, and the evidence of witnesses abroad is required, the commission issues, on the certificate of the Master, without any previous application to the Court; Bamford *v.* Bamford, 2 Hare, 642; and a motion to the Court without such certificate, held to be irregular. On this subject, see (if reported) Braner *v.* Mitford, before V. C. Knight Bruce, 12th July, 1845, MS.

A commission for the examination of witnesses, to falsify an examination of a party, before a Master, cannot be obtained, without the usual certificate of the Master, of the necessity for such a commission; Bearcroft *v.* Berkeley, 2 Cox, 108.]

(*d*) [As to Commissions generally, *vide supra*, p. 94, *et seq.*, and as to Commissions to examine abroad, *vide supra*, p. 112, *et seq.*]

(*e*) Chaffen *v.* Wills, Dick. 377.

how passed.

passed nearly in the same way as of evidence taken previously to the decree. The following certificate, signed by three of the clerks in Court, was received and acted upon by the Vice Chancellor, (Sir L. Shadwell); "We humbly certify, that, in the case of the examination of witnesses after a decree, such witnesses having been examined either by commission, or before the Examiner, the publication of the depositions is passed by order of the Court, unless the publication be passed by the respective clerks in Court signing a consent to pass publication in the six-clerks rule-book: but in the examination of the witness by the Master personally, (a circumstance rarely occurring), the publication is by warrant granted by the Master." (*a*)

Exhibits;

As for Exhibits, the Order of the 3rd of April, 1828, Lyndhurst, C., No. 60, provides, "That where by any decree or Order of the Court, books, papers, or writings, are directed to be produced before the Master, for the purposes of such decree or Order, it shall be in the discretion of the Master, to determine what books, papers, or writings, are to be produced, and when and for how long they are to be left in his office; or in case he shall not deem it necessary that such books, papers, or writings, should be left or deposited in his office, then he may give directions for the inspection thereof, by the parties requiring the same, at such time and in such manner, as he shall deem expedient." (*b*)

[392]

produced and left, in his office;

or inspected elsewhere.

Advertisements, for creditors, heirs at-law, next of kin, &c.

In addition to these, a species of negative proof is allowed, before the Master. Advertisements are inserted in the Gazette and other Newspapers, for creditors, heirs-at-law, next of kin, or incumbrancers, and, on their not answering, their non-

(*a*) Handley v. Billinge, 1 Sim. 511. [In the Exchequer, (when a Court of Equity,) commissioners appointed to examine witnesses, in aid of the Master, after a decree, were not sworn to secrecy; Hall v. Clee, 2 Yo. & C. 725.]

(*b*) [Sand. Ord. 725.

Obtaining the four-day Order for production of deeds, before certificate of default filed, held regular, in Askew v. Peddle, 10 Sim. 182; notwithstanding Frisby v. Stafford, 7 Sim. 365, cited below. The four-day Order, to enforce the production of documents in the Master's office, does not require personal service; and the general Order, (of August, 1841,) held not to apply to proceedings in the Master's office, by warrant and subsequent process under a decree; Hobson v. Sherwood, 6 Beav. 63. In the Court of Exchequer, on a direction to produce documents before the Master, as he should think proper, an appeal (used to be) by way of exception, and not of motion, and the Court would direct him to certify, so as to raise exceptions thereto; Toulmin v. Copeland, 3 Yo. & C. 382.]

existence is assumed. (*a*) The rules of advertising are matters of routine in the Masters' Offices. (*b*)

We have seen, that at the meeting "to consider the decree," the Master is, "to point out whether the matters requiring evidence, shall be proved by affidavit." (*c*) Formerly affidavits could not be used, except by consent, (*d*) and the question has arisen, whether the Order quoted has conferred a new power upon the Master. It would appear not; for since those Orders have been in force, Sir J. Leach, M. R., (who assisted in drawing up the Orders), has used the following language, "The Master cannot proceed upon any inquiry before him, by affidavit, without the consent of all parties; for this reason, that the proceeding by affidavit does not afford the opportunity of cross-examination." (*e*) At all events, if the Master has not declared at the time appointed for considering the matters of the decree, that the matters requiring evidence, ought to be proved by

Proof by affidavits,

with consent of parties,

allowed.

(*a*) [But only to a certain extent. The Master will report that he "cannot find," &c., when he is not satisfied such heir-at-law, or next of kin, does not exist, *vide supra*, p. 179, n. (*e*).]

(*b*) [And see Hubback on Ev. of Succession; where, indeed, may be found much practical information as to all such inquiries.]

(*c*) [See the Order of 3rd April, 1828, No. 51, referred to above, Sand. Ord. 723. By an Order of 16 Jas. 1, 1618-19, Bacon, C., No. 75, "No affidavit shall be taken or admitted by any Master of the Chancery, tending to the proof or disproof of the title or matter in question, or touching the merits of the cause, neither shall any such matter be colourably inserted in any affidavit for serving of process;" Sand. Ord. 119. And by one of the same Orders, No. 76, "No affidavit shall be taken against affidavit, as far as the Masters in Chancery can have knowledge; and if any such be taken the latter affidavit shall not be used nor read in Court." Sand. Ord. 119.]

(*d*) Tillotson *v.* Hargrave, 3 Mad. 494; Willan *v.* Willan, 19 Ves. 593.

(*e*) Rowley *v.* Adams, 1 M. & K. 545.

[In a case (cited above) the Master, on a reference, making use of affidavits, was directed not to proceed on the affidavits; with liberty, under the circumstances, however, to apply to the Court, if, by death or otherwise, it became impossible to obtain, under a commission, the evidence of the persons who had made the affidavits; Tillotson *v.* Hargrave, 3 Mad. 494.

In the Chancery of Ireland, by consent, liberty was given to the Master to receive evidence by affidavits, instead of by depositions taken on interrogatories under a commission, with a power, if a cross-examination should seem necessary, to resort to interrogatories, notwithstanding the publication of the evidence by affidavit; Booth *v.* Parks, 1 Moll. 465.

In Ireland also, affidavits to prove payments by an executor, not to be received by the Master unless by consent; but the party insisting upon having evidence by depositions to interrogatories, will be ordered to pay the costs of such examination, if unreasonably required; Sandford *v.* Seymour, 1 Moll. 469.

On a reference made on a petition under the stat. 52 Geo. 3, c. 101, the Master may receive affidavits in evidence; *Ex parte* Greenhouse, 1 Swanst. 60; S. C. 1 Wils. 18. As to affidavits in support of such petitions, *vide infra*.]

affidavit, he certainly cannot resort to that method afterwards, but, (as we have mentioned before), "the practice must remain as it was before the issuing of the Orders." (*a*)

Orders as to the affidavits.

[393]

The Order of the 3rd of April, 1828, No. 65, directs, "That all affidavits which have been previously made and read in Court, upon any proceeding in any cause or matter, may be used before the Master." (*b*) And No. 66, (to prevent the obvious evil of counter-swearing without a regular examination, and after evidence has become known, (*c*)) provides, "That where upon an inquiry before the Master, affidavits are received, there no affidavit in reply shall be read, except as to new matter which may be stated in the affidavits in answer; nor shall any further affidavits be read, unless specially required by the Master." (*d*)

Affidavit of a claimant, not to be relied on; its use explained;

In one case, (*e*) Sir S. Romilly spoke of a customary, but anomalous practice, of receiving in the Master's Office, the affidavits of parties respecting their own claims. Lord Eldon explained it thus; "As to the affidavit, the Master, if he relied upon it in a question of this nature, was wrong. The meaning of the practice is, that a person shall not come here, and claim a debt, without giving that assurance, that it is due, which arises from his affidavit; which also, if the debt is contested, affords a protection against the conclusion, from other evidence, that it is due, when the contrary may be within the knowledge of the party himself. Where the debt is contested, no attention is to be given to the affidavit." (*f*)

of no avail where claim is contested.

(*a*) Sir L. Shadwell, in Gibbs *v.* Payne, 4 Sim. 554.

(*b*) [Sand. Ord. 726.]

(*c*) [Following the old Order, adverted to above, p. 511, n. (*c*); and see Newman *v.* Norris, Dick. 259. Where witnesses have been examined, *viva voce*, in the Master's office, their affidavits cannot afterwards be read; Hopkinson *v.* Roe, 1 Beav. 182. After publication of depositions on a state of facts under a decree, no one can be examined as a witness (whether a party or not) without an order of Court, warranted by special circumstances; Winpenny *v.* Courtney, 5 Sim. 554.]

(*d*) [Sand. Ord. 726. As to proof of exhibits by affidavits, *vide supra*, p. 147, and Order of the 26th of Nov. 1841, No. 43. Sand. Order, 886.]

(*e*) Fladong *v.* Winter, 19 Ves. 199.

(*f*) [All affidavits used in the Master's Office must be filed, as others are; Stubbs *v.* Sargon, 2 Beav. 496.

And all depositions and affidavits, by Orders of the 8th of May, 1845, No. 107 (Sand. Ord. 1016) and No. 126 (ibid. 1020) are "to be taken and expressed in the first person of the deponent."

Where the parties before the Master had proceeded on affidavit, and the bill was dismissed as to one defendant; held that his answer could not be used, by the way of an affidavit, as evidence

When no further evidence admissible,

The Order of the 3rd of April, 1828, No. 67, fixes the time at which the admission of evidence before the Master closes; "That the Master shall not receive further evidence as to any matter depending before him, after issuing the warrant on preparing his report; but that he shall not issue such warrant, without previously requiring the parties to show cause why such warrant should not issue." (*a*) In a late case, (*b*) "publication had passed, and copies of the depositions had been delivered to both parties, and read before the Master; the plaintiff then took out a warrant, on preparing the report, which was prepared accordingly." The two objections, of publication, and the above Order, were both taken to an examination afterwards, by the Master for his own satisfaction. The Vice Chancellor suppressed the depositions: the report does not say upon which ground; but it is conceived that either would have been alone sufficient. (*c*) Lord Eldon held, upon long argument and consideration, that after an examination before the Master had been concluded and made known, it was a wholesome practice not to permit any further examination; though, if surprise had been clearly established, he would have broken through the rule. (*d*)

even for the Master's own satisfaction.

[394]

After an examination concluded and known, no other allowed.

Inquiry as to matters of Account.

We have now passed through the stages of an ordinary investigation by the Master on a reference to inquire into facts. (*e*) It is necessary, however, to pay attention to the

against a co-defendant; Hoare *v.* Johnstone, 2 Keene, 553.

A bill being filed by L., against M., his solicitor, for a general account, and taxation of his bills of costs; a decree directing the examination of the parties, upon oath: M. filed interrogatories for the examination of L., which he refused to answer; thereupon an affidavit was filed by M., under an Order of Court, verifying the allegations of facts suggested in his interrogatories: held, under the circumstances, that this affidavit ought to be considered as evidence of the debt, and of the advance of money constituting the debt, by M. to L.; Morgan *v.* Evans, 8 Bli. N. S. 777. As to the evidence necessary to be produced of a debt, and its nature, and how far bond, or other security, was alone sufficient, on re-opening an account settled, between solicitor and client, before the Deputy Remembrancer of the Exchequer; see Lewis *v.* Morgan, 5 Pri. 42.]

(*a*) [Sand. Ord. 726.]

(*b*) Trotter *v.* Trotter, 5 Sim. 383.

(*c*) [And yet see the cases in the Chancery of L., *supra*, p. 511, n. (*e*).]

(*d*) Willan *v.* Willan, 19 Ves. 590. [And see Winpenny *v.* Courtney, 5 Sim. 544, *ut supra*, p. 512, n. (*c*). But see the case of Whitaker *v.* Wright, 2 Hare, 322; the cases there cited, and the observations of V. C. Sir James Wigram.]

(*e*) [By other Orders of the 3rd of April, 1828, No. 73 and No. 74, the Master may, without order, inquire as to scandal, impertinence, or insufficiency, in matters before him, and proceed to remedy the same; Sand. Ord. 727.]

peculiarities of the investigation into accounts, and of the examination upon interrogatories settled by the Master.

Order for taking an account.

When an account is directed to be taken, "It is ordered "that it be referred to the Master in rotation to take an ac- "count, &c.;" after which words, in Chancery it continues,— "And for the better taking of the said account, and discovery "of the matters aforesaid, the parties are to produce, &c., and "are to be examined, &c., as the said Master shall direct, who "in taking the said account is to make unto the parties all just "allowances." (*a*) In the Exchequer, [whilst a Court of Equity,] the form ran thus,—"in the taking of which said "account the said Master is to make to all parties all just "allowances. And for the better taking of the same, they are "to produce before and leave with the said Master all deeds, "books, papers, and writings, in their custody or power "relating thereto, and are to be examined upon interrogatories "as the said Master shall direct. For which purpose and for "the examination of parties as witnesses in aid of the said "account, if necessary, the Master is hereby armed with a "commission, and one or more commission or commissions is, "or are, to issue into the country directed to proper commis- "sioners, for the same purpose, if need require." (*b*)

Account to be brought in,— in the form of Dr. and Cr.

In taking an account, it was formerly considered always necessary that the accounting party should be examined, (*c*) but by an Order of the 3rd of April, 1828, No. 61, "All parties accounting before the Master shall bring in their accounts in the form of debtor and creditor; and any other parties who shall not

[394]

(*a*) Under the Orders of the 3rd of April, 1828, Nos. 69 and 72, the Master has power to examine, *vivâ voce*, witnesses, and creditors, or other claimants; Sand. Ord. 727, *et vide supra*, p. 506, n. (*b*).]

(*b*) See Seton on Decrees, p. 11.

[Partnership accounts having been directed to be taken by the Master, in a case in which some of the books had been lost, the Court directed the Master, if it should appear in taking the account that any necessary books, &c., should be wanting, to report the same specially; and whether, in consequence of the want of such books, he was unable to proceed satisfactorily in taking the accounts; Millar *v.* Craig, 6 Beav. 433. In a case where vouchers were impounded, by the Ecclesiastical Court, the Court of Chancery allowed items, in an account before the Master, to be allowed on affidavit of such impoundment; Neilson *v.* Cordell, 8 Ves. 146.]

(*c*) [Formerly, on a reference of matters of account, the Master was to use the assistance of an officer, called the Auditor of the Court. See divers Orders (Bacon, C.) of 16th of Feb., and 6th of Mar., 1617-18; Sand. Ord. 103, and 2nd of April, 1618; ibid. 104-5. But these officers seem to have very soon vanished.]

be satisfied with the accounts so brought in shall be at liberty to examine the accounting party upon interrogatories, as the Master shall direct." (*a*) The debtor and creditor account is verified by the affidavit of the party, and forms the basis of the investigation. (*b*) If disputes arise, it generally becomes necessary to resort to interrogatories. Mr. Sidney Smith says, "In disputed accounts, this examination becomes so much of course, that I believe it is found, in such cases, that it is cheapest and best to exhibit interrogatories in the first instance." (*c*)

Accounting party may be examined.

Account to be verified by the affidavit of the party.

Interrogatories exhibited.

For examining to accounts, common forms of interrogatories are generally used, copies of which may be obtained by the solicitor at the Master's Office. Indeed, very little of the process of taking an account is brought before counsel; it is usually entrusted to the solicitor, and the rules which regulate it will be found at greater or less length in all the works in Chancery Practice. (*d*) The question, how far an accounting party can discharge himself, by the same document that acknowledges the charge, has been adverted to above; (*e*) and the anomaly of admitting the party's own unsupported oath for sums not exceeding forty shillings, has also been mentioned. (*f*)

Examination thereon.

Such matters of account entrusted to solicitors.

How a party accounting may discharge himself.

Generally, in taking an account, and very frequently in making other inquiries, there is a necessity for examining parties to the suit. The above common form of decree contains an authority for doing so. (*g*) When, however, the party has already been examined in the suit, a special Order is requisite. (*h*)

Examination of a party;

of one who has been already examined.

(*a*) [Sand. Ord. 725. Although this order is imperative, yet a party having acquiesced in the account being brought in according to the old form, cannot afterwards be permitted to turn round, and insist that all the proceedings before the Master shall be set aside; Weale *v.* Rice, (M. R., Nov. 1834) Coop. P. C. 438.]

(*b*) [As to which, affidavits for verification merely, see Lord Eldon's observations, cited *supra*, p. 512.]

(*c*) S. Smith's Ch. Pr. 105.

(*d*) [Dan. Pr. Ch., Headlam's Edit. p. 1173, *et seq.*]

(*e*) *Supra*, p. 6-7. [A party in his examination may charge and discharge himself in the same sentence, but not in different ones; Kirkpatrick *v.* Love, Ambl. 589; but that was before the form of accounts now used precluded his doing so.]

(*f*) *Supra*, p. 364. And see instances of evidence specially admitted in taking accounts, *supra*, p. 6, n. (*a*), *et p.* 196.

(*g*) [Or else it will not be done, *sed vide supra*, p. 506, n. (*b*).]

(*h*) Purcell *v.* Macnamara, 17 Ves. 434. [If in a creditor's suit a decree is made in the usual form, no special interrogatory for the examination of

Interrogatories to be settled by the Master.

How such are prepared.

In all cases in which a party to the suit is directed by the decree to be examined, it is the rule that the Master shall settle the interrogatories. They are generally, however, prepared for the sake of convenience, by the solicitor or counsel: but the signature of counsel is not necessarily required to them. (*a*)

These investigations [396] are for the general benefit of all parties.

Consequences of this.

But though the Master thus entrusts to the parties the power of directing the course of an examination, still he considers it as his own inquiry,—an investigation of the truth, undertaken for the benefit of all parties, and to be carried on without favouring one rather than another. When, therefore, interrogatories are to be settled by the Master, although they are prepared by the party most interested, yet all parties who have any interest are allowed to attend at the settling of them. (*b*) Thus, where the plaintiffs, at whose instance the defendant had been examined, declined to use his examination, and objected to its being read, Sir J. Leach, V. C., decided, that the Master might make what use of it he pleased. (*c*) Thus, also, when two defendants, executors, had been examined, (by a commission,) by interrogatories exhibited by the plaintiff, a co-executor, under a decree to account, Lord Eldon, C., held that the other defendants, creditors, and legatees, were entitled to the benefit of the examination, and might procure copies of it at the six-clerks' office; (*d*) for, as he said, "it would be very extraordinary if the practice required that the parties for whose benefit

the defendants, ought to be allowed, although a case for directing special inquiries is made on the record; Moore *v.* Langford, 6 Sim. 323, and see Hopkinson *v.* Bagster, 1 Yo. & C. 13. Where a sum of money came to the hands of one executor, which he paid over to the other; the first could not, on the usual decree for an account, examine his co-executor, as a witness, to prove, that the money paid over was duly applied; Dines *v.* Scott, Turn. & R. 358.]

(*a*) Bonus *v.* Flack, 18 Ves. 287. [As to others, see Sand. Ord. 416.

The four-day order, if obtained before the filing of the certificate that the defendant has made default, in putting in his examination, is irregular; Fairly *v.* Stafford, 7 Sim. 365. But as to production of documents before the Master, *vide contrà*, Askew *v.* Peddle, 10 Sim. 182, *et supra*, p. 510, n. (*b*).]

(*b*) 2 S. Smith's Ch. Pr. 113. [The examination of an executor, under the usual decree for an account, ought to contain an interrogatory whether he is indebted to the testator, the debt from himself being assets; Simmons *v.* Gutteridge, 13 Ves. 262. And by an Order of the 26th of Aug. 1841, No. 45, the Master is to inquire as to outstanding assets, unless otherwise directed; Sand. Ord. 886.]

(*c*) Gilbert *v.* Wetherel, 2 S. & S. 259.

(*d*) [As noticed above, the Six Clerks' Office was abolished by an Order of the 26th of Oct. 1842, see Sand. Ord. 915. Their duties are now done by the Clerks of Records and Writs; ibid. 916.]

those interrogatories were exhibited, should not have the benefit of them."(*a*) The same question, but extended beyond interrogatories settled by the Master, arose in *Trezevant* v. *Fraser and others*: (*b*) the plaintiff had laid a state of facts before the Master, and had supported it by evidence, and had afterwards taken exceptions to the report. The defendant Fraser having taken no part in the investigation, now filed nearly similar exceptions to the report, and Mr. Pemberton, [now Mr. Pemberton Leigh, Q. C. of counsel,] for him, urged that the Master had not found rightly *according to the evidence brought before him*, which he was proceeding to read. Mr. Beames, [counsel for the other side,] objected, that it was contrary to practice for a party to make use of evidence which he had not produced himself; but Sir C. Pepys, M. R., [now Lord Cottenham, C.,] stating the question to be, "whether all the defendants could argue upon evidence produced by one," said "Not to allow this would lead to a most extraordinary conclusion, that they would all be obliged to send in the same state of facts, to examine the same witnesses, and to produce the same evidence. Any of them may take exceptions, and in supporting them may show the circumstances under which the Master came to his conclusion."(*c*)

Trezevant v. *Fraser.*

[397]

The Master is not restricted, in his examination of a party, by the rule which we have mentioned, with respect to a witness, that it must be confined to one time, and taken continuously. (*d*) This was established, after some disputes, by the following decision of Lord Hardwicke, "Where there is a general direction in a decree, to examine on interrogatories before the Master, as the Master shall direct, then if the party has been examined on one set, and afterwards there should arise another matter, on which the Master thinks it proper for him to be examined; it is in the judgment of the Master

Examination of a party may be at several times;

(*a*) Dyott *v.* Anderton, 3 V. & B. 177.

(*b*) Rolls, 18th Nov. 1835, MS.

(*c*) [As to the course prior to these orders, see Purcell *v.* Macnamara, 12 Ves. 166, and S. C. 17 Ves. 434. As to the conclusiveness of the dates mentioned in the schedule of accounts, annexed to the Master's report; see a discussion in Campbell *v.* Campbell, 2 Yo. & C. 607.]

(*d*) [*Vide supra*, p. 68.]

whether, and at what time, and how often, he thinks fit that the defendant should be examined: nor is a new Order necessary. It is so, indeed, in the case of a witness; for that is different: if a witness is once examined, it might be dangerous, without an Order, to let him be examined again; but that is from the danger of drawing in a witness when it is known what he has already sworn to; but there is no danger as to the party interrogated, who may be examined *toties quoties* without a new Order of Court." (*a*) In some cases it has been allowed upon motion; (*b*) but latterly, it has been considered as the established practice, and the motion has been held unnecessary. (*c*)

by analogy to the pleadings;

Sir Samuel Romilly proved, unanswerably, the necessity of this proceeding, from the analogy of the pleadings; "It is impossible (said he) to put in an original bill all the questions that may be material; the answer frequently suggests something." He urged, with great truth, that such "examinations were just the same as answers; in principle there could be no distinction between them." (*d*)

examinations being like answers.

[398]

Examination of a party to be used against him only.

In another respect, the depositions of a party, (when examined as a party, not as a witness giving evidence on points which do not affect his interest,) bear an analogy to the pleadings. They are not evidence against the other parties, but, like the answer, can be read only against the examinant himself.

(*a*) Cowslade *v.* Cornish, 2 Ves. 270. The reporter had evidently inserted a negative by mistake. [Upon a motion for a commission, to take a defendant's examination, the time is left to the Master, not limited by the order; Hairby *v.* Emmett, 5 Ves. 683.]

(*b*) Hatch *v.* ———, 19 Ves. 116; Lynn *v.* Buck, 3 Mad. 280, and cited 5 Mad. 466.

(*c*) [If after a defendant has put in his examination to the usual interrogatories before the Master, the plaintiff discovers that he has received sums not mentioned therein; the Master is at liberty to receive a new statement of facts, and examine on further interrogatories, founded upon them, without an order of the Court;] Sidden *v.* Forster, 1 S. & S. 335; Price *v.* Lytten, 5 Mad. 465; Lynn *v.* Buck, 3 Mad. 282; [Cornish *v.* Acton, Dick. 149. And, in the Chancery of Ireland; Napier *v.* Stables, 1 Moll. 228, where examinations one after the other were permitted.

Where in an examination, put in by two defendants, executors, it was stated that their receipts had been joint; but it appeared, by affidavit, this was so stated by mistake, and inadvertently, for that in fact one of them had received nothing; liberty was given to him to put in a supplemental examination, to correct the mistake; Hewes *v.* Hewes, 4 Sim. 1.]

(*d*) In Hatch *v.* ——, 19 Ves. 116.

Interrogatories settled by the Master for the re-examination of a witness.

It has been mentioned that the interrogatories must also be settled by the Master when witnesses in the cause are to be re-examined. (*a*) The judgment of Lord Thurlow, quoted in a former chapter contains the law on the subject. (*b*)

Also for an examination of a person *pro interesse suo.*

It is likewise necessary when a person is examined *pro interesse suo.* On such an examination, the practice and mode of proceeding were submitted to Lord Bathurst, by Mr. Dickens, in the following certificate. "A party claiming an interest in estates sequestered or in the hands of a receiver, an order is obtained upon notice of motion, to come in and be examined *pro interesse suo,* wherein a time is to be limited for filing interrogatories. After the examination, the other side hath liberty to examine witnesses to falsify the examination, and a commission of course issues, if necessary, wherein the claimant may join, if he thinks fit; and the commission, (if any) is returned. Publication passeth by order. Then an order is made to refer it to the Master, to look into the examination and depositions, and to certify whether the claimant hath made out any, and what, interest in the premises, or in any, and what, part thereof. The report the Master makes is set down to be heard for directions; and the Court pronounces a final order." (*c*)

Mode of proceeding on such an examination;

reference to the Master;

his report;

final Order by the Court.

Examination, by the Master, of a creditor or other claimant.

An Order of the 3rd of April, 1828, No. 72, Lyndhurst, C., directs "That the Master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *vivâ voce,* or in both modes, as the nature of the case may appear to him to require; the evidence upon such examination being taken down at the time by the Master, or by the Master's clerk in his presence, and preserved, in order that the same may be used by the

(*a*) [*Vide supra,* p. 201.]

(*b*) In Vaughan *v.* Lloyd, 1 Cox, 312, quoted *supra,* p. 201.

(*c*) Hunt *v.* Priest, Dick. 540; cases are cited there in support of the above certificate. [One having been examined *pro interesse suo,* was permitted to sue *in formâ pauperis,* in James *v.* Dore, Dick. 788. As to the examination of a person *pro interesse suo,* see instances;—against a receiver, Gomme *v.* West, Dick. 472;—against a sequestrator, Anon. 6 Ves. 288; but not before the sequestrators have made a return; Pelham Ld. *v.* Newcastle Dss. of, 3 Swanst. 290; and in the Exchequer, see Mackenzie *v.* Powis, 1 Fowl. 192; Martin *v.* Willis, ibid. 181: and

[399]

How to falsify an examination *pro interesse suo.*

Court if necessary. (*a*) An order is obtained by motion of course, without notice, for leave to exhibit interrogatories to falsify an examination *pro interesse suo.* And where the plaintiffs had omitted to do this, but brought the matter before the Court, by excepting to the report, "it was insisted for the person who had been examined, and ruled, that they were concluded by the examination, not having replied to it, (as they ought to have done, and put him upon the proof of it,) as much as if they had set down a cause upon bill and answer." The Reporter, Mr. Cox, adds, "The rule seems to be the same in all examinations before a Master." (*b*)

Objections to interrogatories settled by the Master.

When the Master has settled the interrogatories, a party who objects to them may obtain from him a certificate, which is in the nature of a special report; and to this certificate, exceptions may be filed. The point was brought into question in *Chennell* v. *Martin,* (*c*) where Sir L. Shadwell, after elaborately searching into the cases, established the practice.

Examination returned to such interrogatories.

The examination returned to interrogatories settled by the Master is usually signed by counsel. Sir J. Leach, V. C., in one case, (*d*) seems to say that the policy of the Court requires it. But Lord Eldon thought it unnecessary, as there was no order to that effect. (*e*)

Allegation of insufficiency.

If any party wishes to complain of an examination, on the ground of its being insufficient; by the

in Ireland, Dunne v. Ferrall, 1 Ball & B. 122; Copeland v. Masse, 2 Ball & B. 65.

In the Chancery of Ireland, a party desiring to be examined *pro interesse suo,* must file a charge, before he can compel the plaintiff to lodge personal interrogatories, for his examination. It is the practice, in the Master's Office there, to require a charge and discharge to be filed, in all cases in which there is a controversy between the parties; Crone v. O'Dell, 2 Hog. 144.

A party claiming to have a mortgage on an estate prior to the plaintiff's right, was ordered to come in and be examined *pro interesse suo;* and on his neglect to put in his examination, an order was made, for him to do so, and to procure a report in a fortnight. On the report being made, his claim was allowed and costs given to him; Cooper v. Thornton, Dick. 72; S. P. Bowles v. Parsons, ibid. 142.

No jurisdiction to compel a party to be examined *pro interesse suo;* Kaye v. Cunningham, 5 Mad. 406.]

(*a*) [Sand. Ord. 727.]

(*b*) Rowley v. Ridley, 3 Swanst. 308, note; and Att. Gen. v. Mayor of Coventry, ibid. 311.

[A commission for the examination of witnesses to falsify an examination of a party before the Master not granted without certificate from him of the necessity for such; Bearcroft v. Berkeley, 2 Cox, 108. As in case of other commissions, *vide supra,* p. 127-8.]

(*c*) 4 Sim. 340.

(*d*) Keene v. Price, 1 S. & S. 98.

(*e*) Bonus v. Flack, 18 Ves. 287; and see Yates v. Hardy, Jac. 223. See Sand. Ord. Index, *voce* Counsel.]

Orders of the 3rd of April, 1828, No. 73, and No. 74, he is at liberty, without any order of reference by the Court, to take out a warrant for the Master to examine into the matter; and the Master in deciding on the sufficiency or insufficiency of the examination, is to take into consideration the relevancy or materiality of the question referred to. When the Master has certified the examination to be sufficient, a party objecting must take exceptions, as he would to a report; (*a*) it is wrong to pray "That the Master's certificate may be discharged and that the defendants may be ordered to put in a sufficient examination to the interrogatories." (*b*)

The Master to decide.

Objections to decision.

Master's certificate.

[400]

The rules relating to exceptions will be found in the treatises on the practice of the Courts. (*c*) When the ground of exception is that the Master ought to have reported a fact, which he has not considered sufficiently proved, it is not allowable to introduce new evidence on the hearing of the exceptions; if the party excepting can satisfy the Court that the point is capable of proof, it will sometimes refer the report back to the Master to be reviewed, (the exceptant giving up his deposit,) (*d*) and then exceptions will lie to his new report, or to his refusal of the evidence. This was clearly settled by Sir J. Leach, V. C., (*e*) Lord Hardwicke had refused to hear affidavits filed subsequently to a report, though in that case the adverse affi-

Exceptions thereto.

(*a*) [Sand. Ord. 727.]

[Defendant's examination being insufficient, plaintiff died; the suit being revived, the Master was ordered to tax the costs of the insufficient examination; Lyne *v.* Ably, Dick. 143. Motion to add interrogatories for examination of a defendant, his examination already put in being reported insufficient, should be on notice; Anon. 3 Atk. 511.]

(*b*) Chalk *v.* Thompson, 4 Sim. 350. [As to scandal, &c. *vide supra*, p. 214.]

(*c*) [As *e. g.* Dan. Ch. Pr. Headlam's Edit. p. 1231; and see Purcell *v.* Macnamara, 12 Ves. 166; S. C. 17 Ves. 434, as to the old course.]

(*d*) Hedges *v.* Cardonnel, 2 Atk. 408. [Upon the allowance of exceptions to a report, approving of a title; the Court will, on the application of the vendor, refer it back to the Master, to review his report; in order to give the vendor an opportunity of producing evidence to remove the objection; Andrew *v.* Andrew, 3 Sim. 390, and S. P., Egerton *v.* Jones, 3 Sim. 392.

Upon a reference to take an account and exceptions to the Master's report, as to the amount found due, allowed; where it is referred back to him to review his report, he is at liberty to receive further evidence; and when the exception was that he ought to have found either that nothing was due, or not exceeding a certain sum; held, that by an order referring it back in general terms, the Master was precluded from entering into any other inquiry than whether anything, or a sum not exceeding £ , was due; Traill *v.* Twyford, 3 Myl. & C. 345. It is not the course to take the report to be right unless it can be shown to be wrong. The Court requires the party in whose favour it is, to show how it is supported; Kilbee *v.* Sneyd, 2 Moll. 195, *sed vide supra*, p. 506.]

(*e*) In Ridifer *v.* O'Brien, 3 Mad. 43.

davits had been filed only the evening before the report, "for," he said, "this would be determining the matter *ex post facto*."(*a*)

Master's report how made the basis of future proceedings.

When the report has been confirmed, and is not impeached by a petition of review, it is taken as so much established ground, it is made the basis of future proceedings, and is argued upon as indisputable. (*b*)

Issue directed.

But before it arrives at this stage, a point will often arise which cannot be satisfactorily decided without an issue of fact or law.

Sometimes the whole referred to a Court of Common Law.

Sometimes, even the proceedings before the Master have only made it obvious that it would have been proper to have referred the whole matter to the ulterior tribunal in the first instance. (*c*).

(*a*) Davis *v.* Davis, 2 Atk. 21. [And see Anon. 1 Mos. 191; *Ex parte* Grylls, 2 Deac. & Ch. 290; Rands *v.* Pushman, 6 Sim. 46. Evidence is not to be received by the Master after he has settled his report; Thompson *v.* Lambe, 7 Ves. 587. And now by an Order of the 3rd of April, 1828, Lyndhurst, C., No. 67, the Master is "not to receive further evidence as to any matter depending before him, after issuing the warrant, on preparing his report." Sand. Ord. 726.]

(*b*) [As in a decree there is mention of the evidence read, *vide supra*, p. 212; so, although, by an Order of the 26th of Aug. 1841, No. 48, "In the reports made by the Master of the Court, no part of any state of facts, charge, affidavit, deposition, examination, or answer, brought in or used before them shall be stated or recited; yet such shall be identified, specified, and referred to; so as to inform the Court what state of facts, charge, affidavit, deposition, examination, or answer, were so brought in or used." Sand. Ord. 886.

On further directions, the Court will not receive an affidavit, in support of a fact, not included in the finding of the Master; Nicholson *v.* Haines, 1 Collyer, 196.

And it may be convenient to know that, where the Master became permanently incapacitated, the cause may be ordered to be transferred to the Master in rotation, with liberty to him to adopt the proceedings already had; Att. Gen. *v.* Haberdashers' Comp., 3 Beav. 130.]

(*c*) See Wilson *v.* Metcalfe, 3 Mad. 45; [and the following sections, as to Issues of fact or law.]

SECTION III. [401]

ISSUE OF FACT.

When granted.

WHEN facts are to be decided which, from their nature, demand publicity for their trial, (as a question whether a party is the heir-at-law of an intestate (*a*)); or where some one interested has peculiar right to the fullest investigation possible, (as an heir who is questioning a will (*b*)); or where the Judge really feels a difficulty too great to be removed by the mere substitution of the Master's opinion for his own, (as in the cases above cited of deaths at sea (*c*)); or where he thinks it better that the responsibility, and perhaps unpopularity, of deciding, should be thrown from himself upon that evanescent tribunal, a Jury (*d*);—in these, and other cases, the Court of Equity calls in aid the Common Law tribunal to declare its opinion on a matter of fact. Some issues have, of late years, been granted almost of course, (*e*) as an issue to try the validity of a modus, (*f*) or an issue *devisavit vel non.* (*g*) It has been mentioned that when the answer stands opposed to the evidence of a single witness, aided by circumstances sufficient to give it weight, the defendant may also claim an issue, as of right. (*h*)

Form of an Order.

The following is from the Common Form of an Order, for an Issue, given by Mr. Seton; "It is ordered that the parties do "proceed to a trial at law, at the next summer assizes to be "holden for the county of , [or 'at the bar of the

(*a*) [As to which, *vide supra*, p. 179, n. (*d*).]

(*b*) As to which, *vide supra*, p. 178, *et seq.*]

(*c*) [*Vide supra*, p. 487.]

(*d*) [And especially where the evidence being contradictory, the credit due to the witnesses respectively comes to be the question; as to which, *vide supra*, p. 5, n. (*b*).]

(*e*) [See Smith *v.* Spencer, 1 Yo. & C. 75.]

(*f*) See the observations of Lord Eldon in O'Connor *v.* Cook, 6 Ves. 665; and in White *v.* Lisle, 3 Swanst. 344.

(*g*) *Vide supra*, p. 184.

(*h*) *Supra*, p. 227.

[According to the principle of the Common Law adverted to in n. (*d*), and the other note there referred to.]

"Court of Common Pleas in Middlesex, some time in the next "Michaelmas Term, or at the sittings after next Term or at such
[402] "other time as the Lord Chief Justice of that Court shall "think fit to direct,] upon the following issue,—whether, &c. "And the plaintiff here is to be plaintiff at law; and the said "defendants are forthwith to name an attorney, to accept a "declaration, appear, and plead to issue. And it is hereby "referred to the said Master to settle the said issue, in case the "parties differ about the same." (*a*) In the Exchequer, it was generally sent to the Common Law side of that Court, to be tried; (*b*) in Chancery, it is usually directed either to the Queen's Bench or the Common Pleas. If there is any reason for a different arrangement, a motion should be made. (*c*) So if the parties find a difficulty in settling the form of the order, and a discussion is likely to arise on any of the points, the decree is drawn up in general terms, and a motion or petition setting forth the special facts, is presented afterwards. Sir J. Leach, V. C., declared this to be the proper course when he was requested to direct an issue in a tithe suit to be sent to a different country from that in which the lands lay. (*d*) It is done when a special jury is applied for. (*e*) And when special circumstances arise which are calculated to induce the Court to alter its order, this is obviously the right mode of application. For instance, when a defendant was likely to have the assistance of his counsel withdrawn from him, he obtained leave, on motion, to postpone the trial till the next assizes. (*f*)

To what Court directed.

Manner of proceeding.

The manner of proceeding is entirely under the control of the Court of Equity. Sometimes, as a more convenient mode of deciding a point, it will order a regular action to be brought at law. In other instances it will retain the bill, for twelve months, with liberty to bring an action, the suit to be then

An Action at Law or

(*a*) [For the form of an issue to try the validity of deeds, alleged to have been executed by a person found, by inquisition, to have been of unsound mind, from a time anterior to the execution, see Franks *v.* Mainwaring, 4 Beav. 37.]

(*b*) See Webb *v.* Rorke, 2 Sch. & Lef. 667.

(*c*) Antrobus *v.* E. I. Co. 5 Mad. 3.

(*d*) Sparke *v.* Ivatt, 1 S. & S. 366. See Chapman *v.* Smith, 2 Ves. 516.

(*e*) Atty. Gen. *v.* Snow, cited 2 P. Wms. 68; Stuart *v.* Greenall, 9 Pri. 480.

(*f*) Bearblocke *v.* Tyler, 1 J. & W. 226.

dismissed if the action has not been brought. When a special question has been stated for an issue, as in the form above, the usual mode of proceeding is, that the party who is made plaintiff in his declaration avers, and the party who is made defendant admits, that a wager has been laid, on the truth of that statement; and on this feigned issue they proceed to trial. Feigned Issue.

[403]

It was decided, in the Exchequer, that a party is always at liberty to make default at one assizes; (*a*) but in Chancery, Sir W. Grant, M. R., recognised no such rule; but said, "it must not be understood that when the Court directs the trial to be at the next assizes, that still the plaintiff at law shall have such command over his issue, that he may try it or not as he pleases." (*b*) The consequence of such default, in Chancery, is, that the adverse party moves to have the issue taken *pro confesso*; and an order to that effect will be granted *nisi*, and confirmed. (*c*) Default. Consequence of default; the issue taken *pro confesso*.

The point in the subject now before us which chiefly calls for our attention, in this work, is, that the Court will often, by its order, suspend certain of the rules of evidence, for the purpose of affording every facility for the trial of the issue. (*d*) Certain rules of evidence suspended for the trial.

Thus the order will contain, if required, a direction that the parties shall make such admissions as are necessary to raise the questions to be determined. Admissions directed to be made.

It also frequently contains a direction for the examination of one or other of the parties to the suit. (*e*) In one case, Lord Eldon is reported to have said, that "it was a very important consideration whether each party should have liberty to examine the other as a witness, and could not be without consent." (*f*) There were probably some special reasons for Parties to be examined.

(*a*) Mitchell *v.* Rabbetts, cited 1 J. & W. 226.

(*b*) Bearblock *v.* Tyler, 1 J. & W. 226.

(*c*) Powell *v.* Wood, 1 R. & M. 354, and cases cited there.

(*d*) [As in Beachinall *v.* Beachinall, 1 Vern. 246. In directing an issue, the Court will not order the examination, at the trial, of any persons who, by the rules of the Courts of Law, could not be examined without order; except in cases where the facts rest only in the knowledge of the plaintiff and defendant; *Ex parte* Dister, Buck. 234. And now see the stat. 6 & 7 Vict. c. 85, *supra*, p. 326-7.]

(*e*) *Vide supra*, p. 338. See Seton on Decrees, 348, citing Fenwick *v.* Jones.

(*f*) Howard *v.* Braithwaite, 1 V. & B. 374. [Liberty to examine the parties to a petition in bankruptcy on the trial of an issue directed by the Court,

his hesitation. Undoubtedly the Court can, and sometimes does, for it's own satisfaction, make a peremptory order that both the parties shall be examined; and when that is directed, "it is not meant that they shall be witnesses for themselves or for the other side, but they are witnesses for the Court of Equity." (*a*) When the order is simply that a certain party shall be examined, it has been held that no objection to his evidence is waived, except that which arises from his being a party to the cause. (*b*)

In such cases the parties are witnesses for the Court.

[404]

Depositions to be read.

The order frequently also contains a direction "that the "parties be at liberty to read the depositions, (*c*) taken in the "cause, (*d*) of such of the witnesses as, upon the trial, shall be "proved to be dead, or unable to attend to be examined." (*e*) This supersedes the necessity of regularly introducing the depositions, as secondary evidence, by proof of the bill and answer, (*f*) and other preliminary proceedings; (*g*) the order is

Effect of this being ordered.

was refused, by the Lord Ch., *in re* Christie, 1 Dea. & Ch. 290. But a defendant, a mere trustee, was allowed to be examined, in Fletcher *v.* Glegg, 1 Yo. 345. *Ut supra*, p. 338, *et seq.*]

(*a*) Lord Eldon in De Tastet *v.* Bordenave, Jac. 521. See the arguments and cases cited there, particularly Gardner *v.* Rowe, 4 Mad. 236, [*et vide* Fletcher *v.* Glegg, 1 Yo. 345, *ut supra*, where such an order was made.

Where on an issue directed by the Court of Chancery, the plaintiff calls a witness who gives adverse testimony; held that, being a witness of the Court, rather than of the party, the plaintiff might put questions in the nature of cross-examination; Bowman *v.* Bowman, 2 Mood. & Rob. 501.]

(*b*) Rogerson *v.* Whittington, 1 Swanst. 39. [See the stat. 6 & 7 Vict. c. 85, (cited fully, *supra*, p. 326-7,) what objections now remain to competency, and what only to credibility.]

(*c*) [Depositions were ordered to be delivered over to a Clerk in Court, for the purpose of producing them in a Court of Law; (he having been already ordered to attend with the bill and answers,) in Lovell *v.* Yates, 1 Hare, 229.]

(*d*) [As to the depositions of witnesses in other causes, and relevant, see London, City of, *v.* Perkins, 3 Bro. P. C. 602. *Et supra*, p. 256, *et seq.*]

(*e*) See Seton on Decrees, 346.

[An application to be allowed to be read, as evidence, (on the trial of an issue at law, directed by the Court of Chancery,) the deposition of a witness in Equity, on the ground of his being unable, by reason of age, or infirmity, to attend in person, must be made to the Judge, at the trial; and not to the Court which directs the issue; Jones *v.* Jones, 1 Cox, 184. See Holcroft *v.* Smith, 1 Eq. Ca. Ab. 224. And witness becoming interested, Gosse *v.* Stacey, 1 P. Wms. 287; S. C. 2 Vern. 698. Witness having become blind (and other cases), *supra*, p. 366.

But as to interest merely, the stat. 6 & 7 Vict. c. 85, removes the objection to competency in most cases; as already so frequently observed.

Depositions of witnesses in a cause (they subsequently dying) ordered to be read on the trial of an issue in the cause; and where the plaintiff (dying) had appointed a witness his executor, who revived the suit, his depositions were ordered to be read on such trial; Andrews *v.* Beauchamp, 7 Sim. 65.]

(*f*) [On an issue directed by this Court, the original answer is not sent down to the trial, whether between the same parties or not, until after refusal of the office copy as evidence; Anon. 1 Ves. jun. 152, and see Jarvis *v.* White, 8 Ves. 313.]

(*g*) Lord Eldon in Palmer *v.* Aylesbury, Lord, 15 Ves. 177; [Corbett *v.*

an authority to the Judge to receive the evidence without that introductory matter. (*a*) It also gives validity to depositions taken *de bene esse*, (whenever the Court thinks fit that they should be used in trying the issue. "Where a deposition *de bene esse*, (to the taking of which any irregularity of any kind might have been effectually objected, before the hearing of the cause,) has been read, at the hearing of the cause, it is of course, if any issue is directed, to order it to be read upon the trial; (*b*) upon which, it would seem, it would not be evidence, (being a deposition before issue joined), without such an order." (*c*)

Other differences from regular trials, as to the forms and incidents.

As the whole proceeding takes place [solely] for the purpose of "informing the conscience of the Court," and is not conclusive; (*d*) the Court, in directing it, is not strictly bound down to the forms and incidents of a regular trial. Sometimes it insists on more than the common law tribunal would have been satisfied with; as in the issue *devisavit vel non*, where the examination of all the three witnesses to the will is indispensable. (*e*) Sometimes it is satisfied with less, as we have just seen with respect to the admissibility of evidence. "It is the habit of the Court to direct that if the substance of the issue is found, but with some special circumstances, which may be material in measuring the extent of the relief to be given, on further directions, that matter shall be endorsed on the *postea*." (*f*) When the verdict is returned, the Equity Judge does not look barely at the wording of it, as he would if a verdict on a former trial were produced in evidence, but he inquires into all that passed during the proceedings. For this purpose he listens to the statements of counsel, detailing what occurred at the trial; (*g*) and if he sees sufficient reason

[405]

Consideration by the Judge in Equity, of the Verdict.

Statements of Counsel, and

Corbett, 1 Ves. & B. 335.] And as to reading depositions, *vide supra*, p. 258, *et seq.*; and see 1 Phil. on Ev. 346.

(*a*) Lord Eldon in Gordon *v.* Gordon, 1 Swanst. 171; [S. C. 1 Wils. 155, and see Corbett *v.* Corbett, *ut sup.*]

(*b*) [Although there may have been an irregularity in the examination, which might have been objected, at the hearing; Gordon *v.* Gordon, *ut supra.*]

(*c*) Lord Eldon in Gordon *v.* Gordon, 1 Swanst. 171; and see the cases cited in the note there.

(*d*) [*Vide sup.*, p. 498, *et infra*, p. 528.]

(*e*) [*Vide supra*, p. 180. Bootle *v.* Blundell, 19 Ves. 494, 500, *et supra*, p. 184, n. (*e*).]

(*f*) White *v.* Lisle, 3 Swanst. 345.

(*g*) *Anon* 6 Mad. 58.

Notes of the Judge, at Law.

for it, he sends to the Judge who tried the issue, for his notes. (*a*) After all, he may, if he thinks fit, make no use whatever of the verdict, but treat it as a mere nullity.

Court of Equity not bound by the verdict.

The standard being itself so vague as the satisfaction of the conscience of the individual Judge who has directed the issue, the rules for granting a new trial are extremely indefinite. He will often, almost arbitrarily, (perhaps on a suspicion, which he has formed, that a witness has been perjuring himself,) (*b*) send it back to another jury, or even decide in the teeth of a verdict. And he will often pay no heed to the most flagrant misdirections of the Judge, or mistakes as to the admission of evidence, if he can satisfy himself what the verdict ought to have been, on the admitted and tendered evidence which was sound.

Motion for a new trial to be made before the same Judge in Equity.

An Order of the 3rd of April, 1828, Lyndhurst, C., No. 47, put a stop to the inconvenience of applications to the Chancellor, for new trials of issues directed by the other Judges. It runs thus, "That every application for a new trial "of any issue at law directed by a Judge of this Court, be "first made to the Judge who directed such issue;" (*c*) and it has been construed that where the Vice Chancellor had directed the issue, the application must be made to the Vice Chancellor, though the learned Judge himself had become Master of the Rolls. (*d*)

(*a*) But not unless he sees good reason; see a memorandum, 6 Mad. 58. And when obtained, those notes cannot be used for any other purpose, or in any other proceeding; *ex parte* Learmouth, 6 Mad. 113.

(*b*) [*Sed vide supra*, p. 5, n. (*b*).]

(*c*) [Sand. Ord. 722.]

(*d*) Footner *v.* Figes, 2 Sim. 319.

[The Court will not direct a new trial of an issue, on the ground of evidence having been adduced on the former trial, when that evidence was a surprise on the other party, and tended to defeat the intention of the Court, in directing the former issue; Carrington *v.* Jones, 2 S. & S. 135.

An issue having been directed and tried, although the Court was much dissatisfied with the verdict, yet a motion for a new trial, on the ground of having further evidence to produce, there being no fraud, or surprise, but the evidence only kept back, by the party applying, was refused, in Standen *v.* Edwards, 1 Ves. jun. 133.

Where on an issue the evidence is fairly before the Jury, and the Judge is satisfied, there is great difficulty in supporting a motion for a new trial on the ground that the verdict is not supported by the evidence; but a Court of Equity will, nevertheless, entertain the motion, and attend to the course of trial, the issue having been directed for it's satisfaction; Johnston *v.* Todd, 5 Beav. 597. And see Northampton Railway Comp. *v.* Southampton Railway Comp., 11 Sim. 42, cited more fully below, as to a Case at Law or Issue of Law.]

It would, perhaps, have been a still greater improvement, if the same Order had put an end to appeals for the new trial of an issue, from the Judge who originally directed it, and whose conscience may now be sufficiently satisfied. (*a*) Appeals.

(*a*) [See Att.-Gen. *v.* Robson, 11 Cl. & Fin. 471, affirming the judgment below, in S. C. (a case of pedigree); Monkton *v.* Att. Gen., 2 Russ. & M. 147. New trial was refused also in Clapham *v.* Shillito, 7 Beav. 146.

A bill of exception for an alleged misdirection of the Judge, who tried the issue will not lie. The proper course is to apply to the Court which directed the issue; Lewis *v.* Armstrong, 3 Myl. & K. 45.

Upon an order for the new trial of an issue, and a commission, staying the former until the return to the latter; held, that *laches* in proceeding with the commission, ought not to affect the right to proceed on the former; and an order reversing the whole of the original order was reversed, in Colvin *v.* Campion, 2 Cl. & Fin. 523; S. C. 8 Bli. 523.

It has been held, that the influence which the reputation of a witness, on the trial of an issue directed, whether good or bad, might produce on the jury was not a ground for changing the venue; McGregor *v.* Topham, 3 Hare, 488.]

[406]

SECTION IV.

ISSUE OF LAW. (*a*)

Lord Eldon's opinion.

IN one of the last appeals, at the hearing of which Lord Eldon assisted in the House of Lords, he used these words, "My Lords, I may be wrong, perhaps, but I cannot help stating, what I have very often done before, and what I again recommend in my old age, speaking from the experience I have had in the Court of Chancery, (and I believe my practice was governed by what I thought,) that the habit too much adopted of sending matters in Equity for the decisions of Courts of Law, which ought to have been decided in the Equity Court, has led, in many instances, to bad consequences." (*b*) It is, in truth, in almost every instance, unsatisfactory, for the highest law authority, or for any Equity Judge, to declare himself unable to expound the laws of the land; particularly when he can, at any time, call other Judges to his assistance, and deliver his judgment, aided by their advice. (*c*) The fact is, that of late years, they have been driven, by the pressure of business, to this method of saving time." (*d*)

(*a*) [Or case sent to the Court of Law for their opinion.]

(*b*) Bulkley *v.* Wilford, 26th June, 1834.

(*c*) [On hearing a petition, in the matter of the Suitors of the Court, the question being one as to the clerkship in Master Lynch's office. The Ld Ch. Lyndhurst, took to his assistance Lord Langdale, the Master of the Rolls: the chief of the Masters.

But the sort of assistance alluded to in the text, is that referred to in (amongst other cases) Blundell *v.* Gladstone, 11 Sim. 489. Sir Lancelot Shadwell (the V. C. of England), in giving judgment said, "If I had had the least doubt on the question, (one of construction of a will, under circumstances of a mistake, or misnomer,) I certainly should have acted as a Judge of this Court, who entertains a doubt, ought to do; and have sent a Case to a Court of Law: but the case seems to me to be a very simple one and free from doubt, &c." It may be added that the Lord Ch. Cottenham, assisted by Mr Justice Patteson and Mr. Justice Maule, subsequently affirmed this very decision (on appeal) in Hil. T. 1843.]

(*d*) [But nevertheless, and although additional Judges have been appointed since Lord Eldon's time, and this excuse partially removed, the right and propriety of a Judge sending a case to a Court of Law is indisputable; Blundell *v.* Gladstone, 11 Sim. 489, *ut supra*, n. (*c*).]

Form of the Order.

The Order generally sets forth the facts to be stated, and the question; and directs that it be settled by the Master in case the parties should differ. (*a*) Sometimes it merely refers it to the Master to draw up a Case; (*b*) and sometimes it draws up the Case without that reference. (*c*)

[407]

Jealousy of Courts of Law formerly.

The Courts of Law have always been jealous of this use which is made of them. Formerly they would not send back an Opinion upon a Case referred to them by the Master of the Rolls. (*d*) But their refusal merely put the parties to the expense of getting the Order of reference affirmed by the Chancellor. (*e*) Lord Kenyon, in 1795, said, "I believe that there is no instance in which this Court ever certified their opinion on a case sent here from the Master of the Rolls. (*f*) In *Colson* v. *Colson*, it was refused: but I think it was an idle formality; and I shall feel no reluctance in certifying in such cases, because I think it is convenient to the suitors of that Court." (*g*) Again, they will not answer a speculative question, therefore, it is sometimes necessary to state fictitious facts, which raise the point to be determined. (*h*) So again, they object to giving an opinion upon the construction of equitable interests; consequently, the limitation ought to be so stated as to make them appear legal estates. (*i*) The Court of Law requires, that it should have the signature of a Counsel on each side, and if either party neglects or refuses to procure such signature, he loses the benefit of the issue. (*j*)

When the estate in question was of small value, and yet an issue was required, Lord Hardwicke used often, instead of

(*a*) Att. Gen. *v.* Lloyd, cited in Seton on Decrees, 354; Prebble *v.* Boghurst, 1 Swanst. 313, note.

(*b*) Ceal *v.* Ashurst, Dick. 474, where earlier cases are spoken of.

(*c*) Ashburnham *v.* Kirkhall, and Harman *v.* Spottiswood, Dick. 73.

(*d*) Colson *v.* Colson, 2 Atk. 248; [unless sitting for the Chancellor *dictum* of Sir Lloyd Kenyon, M. R., in] Horton *v.* Whittaker, 2 B. C. C. 88.

(*e*) Colson *v.* Colson, 2 Atk. 250.

(*f*) [The stat. 2 & 3 Wm. 4, c. 94, ss. 24-25, has thrown on future Masters of the Rolls the duty of hearing motions, pleas, and demurrers, thereby multiplying the number of cases in which he is likely to have doubts as to matters of law.]

(*g*) Daintry *v.* Daintry, 6 T. R. 313. [And, accordingly, Sir Wm. Grant, M. R., sent a case for the opinion of the Court of King's Bench, which was then twice argued, before the whole Court, in Cholmondley, Ld., *v.* Clinton, Ld., 2 Mer 171.]

(*h*) Bliss *v.* Collins, 1 J. & W. 427.

(*i*) Houston *v.* Hughes, 6 B. & C. 412.

(*j*) Bliss *v.* Collins, 1 J. & W. 426.

sending the point to be determined by a whole Court, to direct that it should be heard and argued before two Judges at their Chambers. (*a*)

Certificate.

If the certificate returned should be very unsatisfactory, the Court of Equity will sometimes send the issue to be tried again, in another Court of Law. (*b*) Lord Eldon did this, remembering but one instance in which a case had been sent back to the same Court to be reviewed.

(*a*) Rigden *v.* Vallier, 3 Atk. 735.

(*b*) In Trent *v.* Hanning, 10 Ves. 500. [Although the Court of Equity would have been satisfied if the opinion on a case, or the verdict on an issue, directed by it, had been the reverse of what it is; yet it is not the duty of the Court to direct another case, or another issue, unless it sees that the opinion or verdict is clearly wrong; Northampton R. Comp. *v.* Southampton R. Comp., 11 Sim. 42.]

CHAPTER VI.

[408]

EVIDENCE ON APPEALS AND RE-HEARINGS.

Evidence to be entered by the registrar.

THE last care is to see that the Registrar duly enters all the evidence which has been used at the hearing. (*a*) It is his duty to take down in his Minute-book both the exhibits and the depositions; but in drawing up the decree, he only mentions the exhibits. (*b*) He will, however, in curtesy, though not of right, allow his book to be inspected, to see the whole is properly entered: or, if he should refuse, a full copy of all that he has taken down may be demanded, instead of the usual short copy of the minutes. This care is important, because what he has not entered cannot be read upon an Appeal. (*c*) Where the decree is taken by consent, it is usual for him to note down the evidence, although there can be no appeal. But where the plaintiff takes such decree as he can abide by, the defendant not appearing, the evidence is not entered at all. (*d*)

New evidence not allowed on an appeal.

When proofs read but not entered.

In one case, after the decree had been pronounced, the defendants "preferred a petition to the Lord Chancellor,

(*a*) [That is to say, which has been put in and read, or agreed to be considered as read; Button v. Price, Pre. Ch. 212.]

(*b*) [For the form of a Decree under the Orders of the 21st of Dec., 1833, Ld. Brougham, C., see Sand. Ord. 789.]

(*c*) [This principle universally holds; that on the hearing of an appeal, no evidence can be received, which was not laid before the Court below; nor can any evidence which was received below be objected to above; unless, indeed, the admission of improper evidence was among the points of appeal; Eden v. Earl Bute, 1 Bro. P. C. 465. But *semble* the House of Lords, although a Court of Appeal, may, and does, look at evidence rejected below; to see whether, if admitted, it ought to have made any difference in the decree; and that although the House should be of opinion that such should have been received below; yet, at the same time, if they should be of opinion that if received it ought to make no difference in the decree, they will not remit; Maccabo v. Hughes, 2 Dow & Clk. 440; S. C. 5 Bli. N. S. 715.

That in general, on hearing a petition in bankruptcy, all affidavits filed are entered as read; see *ex parte* Lucas v. Oldham, 3 Deg. & Ch. 664; S. C. 1 Mont. & Ayr. 405.

But evidence which cannot be used at the hearing must not be entered; Law v. Hunter, 1 Russ. 100; S. P. Walker v. Woodward, 1 Russ. 107. And the costs of documentary evidence not read, or entered as read, were disallowed, in Stuart v. Greenall, 1 M'Cl. 705; S. C. 13 Pri. 755.]

(*d*) Stubbs v. ——, 10 Ves. 30.

(Bathurst), stating that they had several proofs, taken in the cause, and several exhibits, which they found by the Registrar's minutes, were not entered as read; and that there was no direction given for entering the proofs and exhibits as read, which they were advised was very material to be done." The Lord Chancellor ordered that the evidence on both sides should be entered as read, and the plaintiff appealed. The House of Lords reversed the order; but gave liberty to the respondent
[409] to have the cause re-heard; which was done, and the decree having, after a long debate, been affirmed, the evidence was properly recorded. (*a*) Lord Clarendon speaks of a Re-hearing as the right method of getting mistakes of this nature rectified, until the decree is enrolled, and in the same case he decides that a Bill of Review is not the proper course, after enrolment; indeed he seems to think that, after enrolment, the mischief is irremediable. (*b*) But Lord Manners, speaking incidentally on the point says, "If it were a fact misunderstood by the Court, and not introduced into the decree as a fact proved in the cause, that might be a ground for an appeal." (*c*) There is a case, (mentioned in Seton on Decrees,) an appeal from the Court of Exchequer, in which "the decree having omitted to notice evidence, which, though tendered and relied on by the respondent, had not been actually read, to save the time of the Court, the House of Lords directed the appeal to stand over, in order to give an opportunity to apply to the Court below to correct the omission; and afterwards, upon the consent of the appellant to waive the objection, dismissed the appeal with 50*l.* only, and refused full costs on the ground of the omission in the decree." (*d*)

Remedy when entered but not read.

When, on the other hand, Evidence has been entered, which was not actually read, it is not competent for the Judge of the Court below to order it to be struck out of the printed Appendix

(*a*) Eden *v.* Bute, Earl of, 1 B. P. C. 465.

(*b*) Combs *v.* Proud, 1 Ch. Ca. 54, 2 Eq. Ca. Abr. 174. When the bill of review is demurred to, all the facts, including the recitals of the evidence, are admitted, ibid; and see Caterall *v.* Purchase, 1 Atk. 290.

(*c*) In O'Brien *v.* Conner, 2 B. & B. 154.

(*d*) Lodge *v.* Manby, Seton on Decr. 8.

to the case laid before the House of Lords. Such an order made in the Irish Court of Chancery, was discharged: "the regular course would have been to have applied to the House, and their Lordships would, in all probability, on such application, have given leave to the party to apply to the Lord Chancellor of Ireland, and then the alteration, would have been made by him under the direction of the House." (*e*)

[410]

The effect of this rule is, that if care be taken that the Registrar fully understands what evidence is put in, and he notes it down accurately, no question as to the reception of evidence can arise incidentally upon an Appeal; and if two propositions of the Chancery Commissioners had been adopted, the rule would soon have become familiar from daily occurrence. These were, "Prop. 182.—That all appeals from the decisions of the Master of the Rolls and the Vice Chancellor to the Lord Chancellor, shall be heard and disposed of upon the same evidence as was used or read before the Master of the Rolls and Vice Chancellor, and upon no other or additional evidence, unless the appeal be on account of the rejection or admission of evidence." "Prop. 183.—That all Decrees shall contain a precise statement of the particular evidence read and used, distinguishing therein, from folio to folio, the part of the answer

Report of the Chancery Commissioners.

Appeals from the M. R. and V. C. to L. C.

Decrees, the form of.

(*a*) Lopdell *v.* Creach, 1 Bli. N. S. 255. [Accordingly, on appeal, the House of Lords will not consider (as to) the admissibility of evidence, intended to have been used at the hearing, but only whether it was admitted; and the question of admissibility can only be entertained, when the precise point is the subject of appeal, upon evidence rejected below; but in a case where evidence intended to have been used at the hearing, but not then tendered, was afterwards entered on the notes, as read, and so inserted in the Appendix to the printed case of the party, before the House; leave having been obtained, according to the course of the House, on petition, to proceed to expunge it from the Registrar's notes; the Lord Chancellor made the order to expunge; it appearing clearly to have been irregularly entered; and his Lordship declared that the introduction of it on the notes, in that case, was not corruptly made; but occasioned by a loose practice in the office, and that the party intended to use it, and that it may be material; leaving it open to the defendants to apply to the House for permission to produce, and have the benefit of, the evidence; in case the House should consider that the same, if tendered at the hearing, ought to have been received; correcting the irregularity, and at the same time guarding against prejudice and injustice by providing for the discussion of the admissibility of the evidence originally before the Court of Appeal; Westmeath, Ld., *v.* Salisbury, Ld., 1 Moll. 421. Whether an appellant who wishes to avail himself of evidence not produced before the Court below, must not, either in his petition of appeal, or by a special petition for that purpose, pray that it may be received before the Judicial Committee of the Privy Council; see Jephson *v.* Riera, 3 Knapp, 130.]

or deposition which was read and used; and that it be the duty of the Registrar to make a note, in his book, of all evidence which is tendered, whether it be received or rejected." (*a*) It is probable that these recommendations will, at no distant period, be adopted, and if the first ever becomes the law, the great utility of the second is obvious. (*b*)

Appeal from the M. R. and V. C. to L. C. looked upon merely as a re hearing.

But as, according to the present constitution of the Courts, the appeal from the Master of the Rolls and the [several] Vice Chancellors to the Lord Chancellor, is looked upon merely as a re-hearing before the same Judge, (just as if the Lord Chancellor had himself originally heard the cause in person instead of by deputy,) (*c*) questions frequently arise respecting the latitude which a re-hearing gives for the introduction of new evidence. (*d*)

On a re hearing, new evidence allowed, but not a new case.

The main restriction is the rule, that a new case shall not be opened on a re-hearing, nor matter put in issue which was not in issue before. (*e*) As long as the questions in issue remain unaltered, additional evidence may be produced. If it has already been taken in the cause, and might have been used at the hearing, there is nothing to prevent its being read

[411]

in the ordinary course. (*f*) But for the introduction of new evidence, a special order is necessary; which is readily granted when the application is merely to prove exhibits, (*g*) but not without difficulty, when it is necessary to bring witnesses before the examiner, or to send out a commission. (*h*) Instances

(*a*) Rep. of Ch. Com. p. 65. [For if rejected still it seems it might require to have notice taken of its having been tendered; see Maccabo *v.* Hughes, *supra*, p. 533, n. (*c*).]

(*b*) [The form of an original decree is still as fixed by an Order of the 21st of Dec., 1833, Ld. Brougham, C., part being "(*here state, in the usual form, a description of the evidence which was read;*)"—see Sand. Ord. 789.]

(*c*) See Wright *v.* Pilling, Ch. Prec. 496. [As to appeal from M. R. to C.]

(*d*) [On argument of a demurrer to a bill of review, only what appears on the face of the decree can be read; but after the demurrer has been overruled, a plaintiff may read any other evidence, as at a re-hearing; Cotterall *v.* Purchase, 1 Atk. 290.]

(*e*) Thompson *v.* Waller, Ch. Prec. 295; Wood *v.* Griffith, 19 Ves. 560, 1 Mer. 37.

(*f*) Lord Eldon in Williams *v.* Goodchild, 2 Russ. 91; Cunyngham *v.* Cunyngham, Ambl. 90; [S. C. Dick. 145. See also Standish *v.* Radley, 2 Atk. 179; as to a re-hearing in the nature of a bill of review.]

(*g*) Higgins *v.* Mills, 5 Russ. 287; Walker *v.* Symonds, 1 Mer. 37, note; Wyld *v.* Ward, 2 J. & W. 381; and see Dashwood *v.* Lord Bukeley, 10 Ves. 236; Buckmaster *v.* Harrop, 13 Ves. 458; Williams *v.* Goodchild, 2 Russ. 91.

(*h*) Williams *v.* Goodchild, 2 Russ. 92; Williamson *v.* Hutton, 9 Pri. 194; White *v.* Fussell, 1 V. & B. 153; and see Needham *v.* Smith, 2 Vern. 463.

of permission being granted under these and similar circumstances, will be found in the Vice Chancellor's judgment in *Hood* v. *Pymm;* quoted [at length] in an earlier Chapter. (*a*) In all such cases, the party through whose negligence the evidence newly introduced was originally omitted, will be punished in the awarding of the costs. (*b*)

What points are in issue on a re-hearing.

A distinction should be borne in mind regarding the points in issue on a re-hearing. (*c*) To the party petitioning to re-hear, the cause is open only on those points of which he complains in his petition, (*d*) but to the opposite party the whole cause is open, and, if he chooses to do so, he may put the whole again in issue. (*e*)

(*a*) *Vide supra*, p. 197.

(*b*) Hedges *v.* Cardonnel, 2 Atk. 408; Higgins *v.* Mills, 5 Russ. 287; [and White *v.* Fussell, 1 V. & B. 153.]

(*c*) The Court of Bankruptcy will, in general, re-hear petitions, and rescind former Orders, upon fresh evidence tendered; but not where such Orders have been made upon petition to stay certificate, or to supersede, or annul, fiats; *ex parte*, and *re* Lavender, 4 Deа. & Ch. 497.]

(*d*) [It may be observed that on appeal the *onus* lies upon the appellant. He must show the Order appealed against to be clearly wrong; Lloyd *v.* Trimleston Lord, 2 Moll. 81.]

(*e*) Rawlins *v.* Powell, 1 P. Wms. 300. [If, after hearing, a witness is convicted of perjury, the party may take advantage of it, upon a re-hearing; Needham *v.* Smith, 2 Vern. 464.

As to supplemental bills; such are, in fact, new bills, and have like incidents, as to evidence. As to facts in issue, and as to which evidence has been gone into, on the original bill, no new evidence can be gone into, on the supplemental bill; Cockburn *v.* Hussey, 2 Ridgw. P. C. 504; and see Brunett *v.* Lee, 2 Atk. 351. Affidavits, in an original suit, may be used in a supplemental one, if notice has been given, and the objection for want of notice is waived by filing an affidavit in answer; Blackmore *v.* Glamorganshire Canal Co., 5 Russ. 151, *et infra*, 540. As to a supplemental bill in the nature of a bill of review, see an Order of the 17th of Oct. 1741; Hardwicke, C., in Sand. Ord. 557. Proofs in an original cause not allowed to be used on a bill of review; see Moseley *v.* Maynard, 2 Ch. Rep. 18.

Bill being called a supplemental bill but being, in fact, only a bill of revivor, the plaintiff was not entitled to read evidence gone into; but he was not ordered to pay the costs of such depositions, until it should appear whether use could be made of them, in taking the account, before the Master; Onge *v.* Incelock, 2 Moll. 31.

In a bill brought to have the benefit of a former decree, plaintiff cannot examine witnesses, much less the same witnesses, to the matters in issue in the former cause; but on such a bill the Court may examine the justice of the former decree; but then it must be upon the proofs taken in the cause wherein that decree was made; Johnson *v.* Northey, 2 Vern. 409; S. C. Pre. Ch. 134.]

[412]

CHAPTER VII.

AFFIDAVITS.

A TREATISE on Evidence in the Courts of Equity, would be defective if it [wholly] omitted the subject of Affidavits. They have, however, strictly speaking, nothing to do with the regular evidence in the cause. (*a*) Their proper use is to support motions and petitions; (*b*) but, for convenience, they are sometimes received in the investigation of defined subjects of inquiry before the Master; (*c*) and, for the security [or satisfaction] (*d*) of the Court, they are required from a party, [in certain cases,] to verify certain statements. The former we have discussed above. The following are instances of the latter. (*e*) In a bill of interpleader, the plaintiff must not only allege, but swear, "that this bill is not exhibited by the consent, knowledge, or combination, of either of the defendants in the bill mentioned, but merely of his own free will, for relief in this honourable Court;" and his affidavit to such effect is conclusive. (*f*) In support of a bill to examine witnesses *de*

Used in support of motions, &c.

Sometimes required from the plaintiff.

(*a*) [Except indeed as used to prove Exhibits, under an Order of the 26th of Aug. 1841, Lord Cottenham, C., No. 43; Sand. Ord. 886, *et supra*, p 147.]

(*b*) [As to Motions, see Dan. Ch. Pr. Headlam's Edit., p. 1450. As to Petitions, ibid. p. 1462. And as to Injunctions, Common, ibid. 1469, and Special, ibid. 1487.]

(*c*) [*Ut supra*, p. 511.]

(*d*) [By an Order of the 8th of May, 1845, No. 29, the record and writs clerk is to enter an appearance on the cases mentioned in the order "upon being *satisfied by affidavit* that the *subpœnâ* was duly served," &c.; Sand. Ord. 995-6. With a view more easily to *satisfy* the Court, (by its officer,) another of these Orders, No. 34, directs, that "Affidavits filed for the purpose of proving the service of a *subpœnâ* upon any defendant are to state when, where, and how such *subpœnâ* was served, and by whom such service was effected;" Sand. Ord. 998. But with all this particularity, there seems scope enough, for the exercise of a judicial discretion, more than is usually delegated by the Court to its officers, not being Masters.]

(*e*) [In what cases an affidavit must accompany the bill, see Dan. Ch. Pr., by H. 372; and as to a demurrer in its absence, ibid. 541.

And as to affidavit of a party used in support of his claim, *vide supra*, p. 512.]

(*f*) [Prac. Reg. 78; Errington *v.* Att. Gen., Bunb. 303;] Stevenson *v.* Anderson, 2 V. & B. 410; where Lord Eldon questions the propriety of such an affidavit [extending to the "knowledge."

It need not express that the suit, is

bene esse, we have seen above that affidavits are required. (*a*) "If an accident is made a ground to give jurisdiction to the Court, in a matter otherwise clearly cognizable in a Court of Common Law, as the loss or want of an instrument on which the plaintiff's title is founded, the Court will not permit a bare suggestion in a bill to support its jurisdiction; but requires a degree of proof of the truth of the circumstances, on which it is sought to transfer the jurisdiction, from a Court of Common Law to a Court of Equity, (*b*) by an affidavit of the plaintiff, [413] annexed to and filed with the bill: thus, if a bill is brought to obtain the benefit of an instrument upon which an action at law would lie, alleging that it is lost, and that the plaintiff, therefore, cannot have remedy at law, an affidavit of the loss must be annexed to the bill, or a demurrer will hold. (*c*) So in the case of a bill for discovery of any instrument, suggesting that it is in the custody or power of the defendant, and praying any relief which might be had at law, if the instrument was in the hands of the plaintiff, an affidavit must be annexed to the bill, that the instrument is not in his custody or power, and that he knows not where it is, unless it is in the hands of the defendant: but if the relief sought extends merely to the delivery of the instrument, or is otherwise such as could only be given in a Court of Equity, (*d*) such an affidavit is not necessary." (*e*) It has been mentioned, that in such instances, the assurance arising from an affidavit, affords a protection to the Court against false conclusions from other evidence, when the contrary may be within the knowledge of the party himself. (*f*)

at the plaintiff's own expense; Metcalfe *v.* Harvey, 1 Ves. 248. And when filed by the public officer of a company, see the proper form, in Bignold *v.* Audland, 11 Sim. 23. And see Walbanke *v.* Sparkes, 1 Sim. 385.]

(*a*) *Supra,* p. 122-3, [*et supra,* p. 131.]

(*b*) Whitechurch *v.* Golding, 2 P. Wms. 541; 3 Atk. 132.

(*c*) See Wolmsley *v.* Child, 2 Ves. 342; Hook *v.* Dorman, 1 S. & S. 227.

(*d*) Whitworth *v.* Golding, Mos. 192; Nels. Rep. 78; Anon. 3 Atk. 17.

(*e*) Mitf. on Pl. 123. And see a note in 1 Mad. Ch. Pr. 197. [So, to obtain an injunction, on motion, before the answer is filed, affidavits are the means used to support the application; see Dan. Pr. Ch., by H. 1533.]

(*f*) Lord Eldon in Fladong *v.* Winter, 19 Ves. 199, *ut vide supra,* p. 512.

Cross-examination wanting.

An affidavit, being always taken *ex parte*, is necessarily wanting in one essential of a deposition, namely, an opportunity for cross-examining the witness. (*a*) Care is, however, taken, that it shall not be wanting in the other great essential of a deposition, (*b*) namely, that perjury can be assigned upon it. (*c*)

Perjury may be assigned upon it.

For this reason, amongst others, it is necessary that the Court and the name of the cause or matter should be mentioned; (*d*) otherwise, it is mere waste paper. (*e*) But affidavits taken in an original suit, may be used in a supplemental suit, if notice be given, and the objection for want of notice is held to be waived, by filing an affidavit in answer. (*f*) Voluntary affidavits, not taken in any cause, have never been recognised by the Court, except as a deliberate assertion of the deponent. (*g*) The voluntary declaration substituted by the stat. 5 & 6 Wm. 4, c. 62, s. 18, stands on the same footing; it merely substitutes the penalties of a misdemeanor, for the moral sanction of an oath. (*h*)

[414]

Voluntary affidavits.

(*a*) [Attempts, however, to proceed upon affidavits are seldom materially checked by this consideration; for as to cross-examination in Courts of Equity, *vide supra*, p. 75; *et* Hawes *v.* Bamford, 9 Sim. 653.]

(*b*) [Some very acute (as well as pertinent) observations made by Lord Langdale, M. R., as to an affidavit prepared for, and made by, a person illiterate and ignorant, and the effect of discrepancies in such an affidavit, see in Johnston *v.* Todd, 5 Beav. 597, *et vide* —— *v* Christopher, 11 Sim. 409. And (by the way) as to the mode formerly used in swearing affidavits of such illiterate persons in the Court of Exchequer, see Reg. Gen. T. T. 1 Geo. 4, 8 Price, 501, and H. T. 40 Geo. 3, ibid. 504.]

(*c*) [See Clendunning *v.* O'Malley, 1 Con. & L. 363, cited more fully below. The deponents not testifying to the express words spoken without adding "or to that effect," is but a proper caution; Auliffe *v.* Murray, 2 Atk. 60. And a similar principle applied in the Admiralty Court, see Shannon, Higginson, *ut supra*, p. 472, n. (*a*).]

(*d*) [See Clendunning *v.* O'Malley, 1 Con. & L. 363.]

(*e*) [As, of course, an affidavit in one cause cannot, in general, be read to obtain an order in another,] see Lambroso *v.* White, Dick. 150. [And as to the title of an affidavit, see Dan. Ch. Pr., by H. 1439.]

(*f*) Blackmore *v.* The Glamorganshire Canal Co., 5 Russ. 151.

(*g*) [And all such affidavits as are not recognised by the Court are deprecated exceedingly, see an Order of 37 Eliz. 1595; Sand. Ord. 66.]

(*h*) *Vide supra*, p. 460.

[As to how far a declaration or affirmation of a Separatist differeth from an oath *in foro conscientiæ*, must be left to the casuist and the divine to consider; but the Legislature, out of extreme tenderness for the consciences of the weaker brethren, seems to affect to recognise a difference! The curious reader may like to be referred to an account of the crafty devices at one time used by the Quakers, to avoid being sworn; as to which, see an Order of the 10th of April, 1676; Sand. Ord. 348, curious enough but far too long for insertion in this place. As to oaths, and the modes of taking such, *vide supra*, p. 65-6, n. (*f*).]

A Peer making an affidavit, is required to swear to it."(*a*)

For the same reason, it is absolutely necessary, that the person before whom the affidavits are taken, should be duly authorized to administer the oath. (*b*) In London, the Masters in Ordinary are the persons appointed for that purpose. (*c*) "At any place which is distant not less than ten miles from the hall in Lincoln's Inn," by an Order of 21st of December, 1833, No. 33, (*d*) they may be taken before a Master Extraordinary; but he must express on the affidavit the name of the place where it is taken, "otherwise the same shall not be held authentical."(*e*) [As to affidavits sworn beyond the jurisdiction of the Court. (*f*)] The authority of a Master Extraordinary in Ireland is recognised here. (*g*) But a solicitor in

Authority to administer an oath.

In London a Master.

Out of Town Master extra.

Abroad.

(*a*) Meers *v.* Stourton, Lord, 1 P. Wms. 146; [S. C. Dick. 21, and 2 Salk. 512, *et vide supra*, p. 65, n. (*f*).]

(*b*) [That all oaths are to be reverently administered and taken, see an Order of 1649; Sand. Ord. 241; and an Order (after the Restoration) of the 22nd of May, 1661; ibid. 310; also another of the 10th of April, 1676; ibid. 349, since which times, either the Orders have been complied with, or, at least, it would seem the Court has charitably hoped as much.

By an Ordinance of April, 1596, "Noe Master in Chancerie takinge affidavit for any contempt only or for serving of process onlie shall therein admitt the swearer to depose any matter tending to the proofe or disproofe of the tytle or principal thinge in question by that suite." Sand. Ord. 69.

By an Order of the 29th of Jan. 1618-19, Bacon, C., No. 75, "No affidavit shall be taken or admitted by any Master of the Chancery tending to the proof or disproof of the title or matter in question or touching the merits of the cases; neither shall any such matter be colourably inserted in any affidavit for serving of process." Sand. Ord. 119. And by No. 76, "No affidavit shall be taken against affidavit as far as the Masters in Chancery can have knowledge; and if any such be taken the latter affidavit shall not be used nor read in Court." Sand Ord. 119.]

(*c*) Bea. Ord. 209; [Sand. Ord. 11 n.; ibid. 119, 241, and 310.]

(*d*) [Sand. Ord. 786, and note.]

(*e*) Bea. Ord. 212. [Sand. Ord. 311. By an Order of the 26th of Oct. 1842, No. 1, "All acknowledgments, affidavits, or affirmations, for the purpose of enrolling any deed or other document in Chancery, may be made, sworn, or affirmed before the Clerk of Enrolments in Chancery, or before any Clerk of Records and Writs, as occasion may require for the better dispatch of business." Sand. Ord. 916.

By No. 7, "Pleas, answers, affidavits, or affirmations, whereon to ground process of contempt; affidavits or affirmations required to be annexed to bills, and oaths or affirmations as to the carriage of pleas, answers, examinations, or depositions of witnesses, taken before commissioners in the country, may be sworn, affirmed, or attested upon honour, before any Clerk of Records and Writs, or before the Clerk of Enrolment in Chancery, as occasion may require, for the better dispatch of business." Ibid. 917.

And by No. 29, "All affidavits and affirmations, to be filed in the Affidavit Office, may be sworn or affirmed before the Clerk of Affidavits." Fees, &c. Ibid. 929; and see also stat. 1 Wm. 4, c. 36, Rule of the 16th of July, 1830, No. 20, as to affidavits of prisoners; Sand. Ord. 746.]

(*f*) [As to the intervention of a Notary Public, see cases below; and now, by the stat. 6 Geo. 4, c. 87, s. 20, Consuls may act as Notaries. *Et vide*, *in re* Barber, 2 Bing. N. C. 268, *et supra*.]

(*g*) Annesley *v.* Anglesey, Earl of, Dick. 90; and see Johnson *v.* Smith,

A solicitor in the cause not to act as such Master extra.

the cause, [although a Master Extraordinary,] is precluded from acting in that capacity [in the cause. (*a*)] An affidavit sworn before a Judge of the superior Courts in Scotland, is allowed, though not before a justice of the peace there. (*b*)

Notary.

On motion, it has been directed, that [an affidavit] "should be sworn before a Notary Public at Amsterdam; with the

Magistrate.

intervention of a proper magistrate, if necessary by the law of the country to the administration of the oath. (*c*)

In Scotland or Ireland.

[By the stat. 6 & 7 Vict. c. 82, "An Act for extending to Scotland and Ireland the power of the Lord High Chancellor, to grant Commissions to enable persons to take and receive affidavits, &c.;" it is provided, by s. 1, "That the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, for the time being, shall have such and the same

Commissions to enable persons to act as Masters Extraordinary.

powers for granting commissions, for the purpose of enabling fit and proper persons to take and receive affidavits, affirmations, and declarations in Scotland and Ireland, and to perform the other duties of Masters Extraordinary of the High Court of Chancery in England, as he and they now have in any part of England."

In case of perjury.

S. 2, Provides as to perjury in Scotland;

S. 3, As to the like in Ireland.

Fees same

S. 4, "That every such person, authorized to act under any

Dick. 592. [As that of a commissioner of the Court of Exchequer in Ireland, was by the Court here; Kilby *v.* Stanton, 2 Yo. & Jer. 75, *sed vide post*, n. (*b*).]

(*a*) *In re* Hogan, 3 Atk. 813; [where he was ordered to pay the costs.] Smith *v.* Woodroffe, 6 Pri. 230. [And so is his clerk, and every one acting as such, although a Master extraordinary; Wood *v.* Harper, 3 Beav. 290. So was the rule in the Exchequer; Smith *v.* Woodroffe, 6 Pri. 230, and Gen. Ord. of 11th of July, 1821; see 9 Pri. 478.]

(*b*) Hyde *v.* Whitfield, 19 Ves. 345; Braham *v.* Bowes, 1 J. & W. 296; and the cases cited there. [*Sed vide* Ellis *v.* Sinclair, 3 Yo. & J. 273, in the Exchequer. As to affidavits in Scotland and Ireland, see stat. 6 & 7 Vict. c. 82.]

(*c*) Chicot *v.* Lequesne, Dick. 150. [An affidavit made before a notary public at Hamburgh, certified to be such, held admissible, at law, under 3 & 4 Wm. 4, c. 74, s. 91; *In re* Schiff, 1 Dowl. & L. 911, and one before a prothonotary of a county in the United States of America, with like certificate; *In re* Way, ibid. 950. The minister of the British chapel at Moscow, (there being neither notary, consul, or vice-consul there, and the magistrates there having no authority to administer an oath,) allowed to administer an oath to one swearing an affidavit in evidence of the acknowledgment of a *feme covert*; *In re* Pickersgill, 6 Man. & Gr. 250.

An affidavit made before a magistrate in America is not admissible, (in proof of the execution of an instrument,) without evidence of the magistrate holding that office; Gurney *v.* Hibbert, 1 Jac. & W. 180.]

such commission as aforesaid, shall be entitled to receive and take such and the same fees, and none other, as Masters Extraordinary of the High Court of Chancery in England, are now entitled to, by virtue of the Orders of that Court, or of any Act or Acts of Parliament now in force." (*a*)] as to other Masters Extraordinary.

Of the form used in drawing up an affidavit, little need be said. (*b*) Besides the name of the Court, and of the cause, (*c*) that of the deponent ought to be inserted at length, with his local, or other, description, (*d*) his signature or mark is added to it, (*e*) and the *jurat* or certificate of its having been sworn. (*f*) If it is not "fairly and handsomely writ, in one hand, without blotting or interlining," the officers are directed not to accept or register it." (*g*) Form of affidavits.

The Affidavit Office had fallen into a state of negligence, when Lord Clarendon began to preside over the Court; for remedy whereof, [by an Order of the 5th of November, 1660, (*h*)] [415] Filing and registering affidavits.

(*a*) [The remaining sections of this Act relative to the Law relating to Commissions for the examination of witnesses, *vide supra*, p. 126*-7*.]

(*b*) [Under stat. 3 & 4 Wm. 4, c. 94, s. 27, depositions taken before an examiner; (see Dryden *v.* Frost, 8 Sim. 380,) and under an Order of the 8th of May, 1845, No. 107, (see Sand. Ord. 1016,) all depositions, and, under another of the same Orders, No. 126, (see Sand. Ord. 1020) all affidavits are to be "taken and expressed in the first person of the deponent." And another of the same Orders, No. 128, (see Sand. Ord. 1020,) provides that "any solicitor, party, or person, filing an affidavit not taken or expressed in the first person of the deponent, is not to be allowed the costs of preparing and filing such affidavit in any taxation of costs."]

(*c*) [As to the power of sustaining an indictment for perjury, on an affidavit intituled in a petition not presented, see Clendinning *v.* O'Malley, 1 Con. & L. 363.

An affidavit must show on its face that the deponent maketh oath, it is not enough that the jurat express as much; Phillips *v.* Prentice, 2 Hare, 642, on the authority of Oliver *v.* Price, 3 Dowl. Rep. K. B. Pract. 261]

(*d*) [In an affidavit in a cause, the plaintiff need not state his residence; Crockett *v.* Rishton, 2 Madd. 446. *Causa patet.*]

(*e*) [A marksman must only make his mark. When such an one, having had his hand guided for him, had written his name, in full, Sir L. Shadwell, V. C. ordered the affidavit to be taken off the file; —— *v.* Christopher, 10 Sim. 409.]

(*f*) [For the form of jurat, see Dan. Ch. Pr., by H. 705 and 1440.]

(*g*) See Bea. Ord. 65, 149, 210. [And an Order of the 28th of Feb. 1632-3; Sand. Ord. 169; ibid 242; ibid. 295.]

(*h*) [Sand. Ord. 294, where see the Order at length. And the prior Orders on this subject, of the 7th of March, 1629-30, ibid. 164, fully recognised by those of 1632-3, ibid. 170. Those of 1649, ibid. 240 to 242, of 1654, ibid. 261. As to lunacy, the Orders of 1655, ibid. 272, and those of 1659, ibid. 286; all which, though for brevity sake, here omitted may perhaps deserve some attention, as throwing light on the subject.

As to scandal, impertinence, and the proceedings to expunge in general, we must refer to Dan. Ch. Pr., by H. 331. The Orders of May, 1845, No. 16, ss. 6, 7, 8, and 9, and Nos. 38 to 42, Sand. Ord. 998, *et supra*, p. 214, *et seq.*

As to prolixity, see the same Orders, No. 122; Sand. Ord. 1019, and *Ex parte* Smith, 1 Atk. 139; *Ex parte* Townshend, 3 Moll. 74.

An affidavit may be wholly imper-

all affidavits, [excepting only those which belong to the Supplicavit Office,] should, "before the same be exhibited in Court, or otherwise produced, to ground any order, writs, process, or proceeding of Court thereupon, be brought into the said Office of registering Affidavits, and be there duly filed (*a*) and registered;" &c. No specific time is fixed by the Order; the words are, "in some due and convenient time after the same be sworn unto, and before use be made thereof in Court." (*b*) An affidavit which cannot be answered, as one that was filed in support of a motion to extend an injunction to stay trial, stating that the plaintiff could not go to trial with safety till the answer came in, was held not to be irregular though filed only the day before. (*c*)

Time of filing, &c.

Reference for scandal, &c.

An affidavit, containing scandalous allegations, may, like any other proceeding, be referred to the Master for scandal and impertinence. (*d*) An affidavit needlessly prolix may be referred

tinent, as in *Ex parte* Palmer, 4 Russ. 188, where one was made to verify the short-hand writers' notes of proceedings. To verify proceedings at law, *Ex parte* Barnes, Mont. & M. 9; or as to practice, *Ex parte* Christy, *re* Barrow, 3 Mont. & Ayr. 94.]

(*a*) [An office copy is the only evidence the Court will admit of the filing of an affidavit; *Ex parte* North, Buck. 396.]

(*b*) [See also an Order of the 13th of Jan. 1697-8; Sand. Ord. 406. And the Master should use none not filed, in making his report; Stubbs *v.* Sargon, 2 Beav. 496. An affidavit of personal service of a petition must be filed, previously to being used; *Ex parte* North, 4 Madd. 395. But affidavit of service need not be mentioned, as intended to be used, in notice of special motion; as others, must if already filed; Rock *v.* Unett, 1 Yo. 268. Affidavits filed before notice of motion, cannot be read on motion, without notice of reading them, unless they are subsequently answered, and are with reference to the notice of motion; Longman *v.* Tyson, *per* V. C. 10th Nov. 1829. C. E. I. Pr. Evidence (*o*), p. 1393. Affidavits ordered to be filed within a certain time, some filed after that time, but no further time allowed to file others or reply; Burton *v.* Matson, Barn 401. And if mentioned, and not filed before service of notice, such cannot be used; Nolan *v.* Lewis, 2 Moll. 369.

In one case, a solicitor was allowed to take affidavits off the file, to attend an action at law therewith, undertaking to return them in the same state; *Ex parte* and *re* Whaley, 1 Mont. & Ayr. 634. An affidavit not filed allowed to be used on an undertaking to file it, in *Ex parte* Baker, 2 Dea & Ch. 362. But *semble*, the practice inconvenient. An affidavit once filed cannot be withdrawn, so as to deprive the other party of the use of it at the hearing of the petition; *Ex parte* Labrey, 3 Dea. & Ch. 232. Affidavits made and used in a cause, for one purpose, may be used again, instead of new ones; Westmeath *v.* Westmeath, 1 Hog. 354.]

(*c*) Jones *v.* ——, 8 Ves. 46.

[Affidavits in reply to those answering a petition are permitted only where new matter is introduced in the affidavits answering the petition; *Ex parte* Shayle, Buck. 244 When, in bankruptcy, a petition is dismissed with costs, the Court will not limit the payment of costs merely to those of the affidavits which were read on the hearing of the petition; for, in general, all affidavits filed are entered as read; *Ex parte* Lucas *re* Oldham, 1 Mont. & Ayr. 405; S. C. 3 Dea. & Ch. 664.]

(*d*) Anon. 3 V. & B. 93; and see *Ex parte* Palmer *in re* Daniell, 4 Russ.

for impertinence alone. (*a*) To file counter-affidavits waives the objection of impertinence, but leaves the questions of scandal still open. (*b*) Mr. Russell, in a note to the case last cited, questions "whether it is regular to refer for scandal and impertinence, by one Order, two affidavits sworn by different persons." Probably it is not. (*c*)

The particular affidavits used in support of various kinds of motions, might be enumerated here; (*d*) but they will always

189. [As to scandal, in an affidavit before the Master, *vide supra*, p. 214, *et seq.* Orders of April, 1828, Nos. 73 and 74; Sand. Ord. 727, 728.]

(*a*) *Ex parte* Smith, 1 Atk. 138. As to prolixity, *vide sup.* p. 543, n. (*h*).

[Pending a reference for impertinence or prolixity, affidavit cannot be used; but, under circumstances, terms will be imposed to meet the justice of the case; Pearson *v.* Hook, 3 Beav. 337; St. John *v.* Besborough, E., 1 Hog. 41.]

(*b*) *In re* Burton, 1 Russ. 380; and see the cases cited there; [Chinelli *v.* Chavet, 1 Yo. 384; but see *Ex parte* Townshend, 3 Moll. 74.]

(*c*) [As to articles of impeachment to discredit a person who has sworn an affidavit in the Chancery of Ireland, see Roe *v.* Ashford, 1 Hog. 127, and Creed *v.* Creed, ibid. 105. And as to impeachment of credit in general, *vide supra*, p. 204, *et seq.*

Although a person has been convicted of perjury, his affidavit, to enable him to sue *in formâ pauperis*, is admissible; Bowyer *v.* McEvar, 1 Barn. & B. 56. And as to infamy, as an objection to competency, see the stat. 6 & 7 Vict. c. 85, removing the same, *supra*, p. 326-7.]

(*d*) [As a general rule, the Court requires in all cases of petitions under acts of Parliament for local improvements, &c., for payment of money out of Court, that the parties applying shall, by affidavit, shortly verify their title, and state that, to their knowledge and belief, no other person has any title to, or claims any interest in the estate; *Re* Fleet Market Improvement Act; *Ex parte* Shears, 2 Y. & J. 493.

Of the evidence by affidavits necessary in cases of alleged contempt of the Court; see an interesting Order of the 22nd of May, 1661, 13 Car. 2, in Sand. Ord. 308, where the rule "out of the mouth of two or three witnesses," &c. seems to have been borne in mind. *Et vide* ibid. 310-11.

If an order of committal be asked, the affidavit must state that the money is still due and owing, and that neither the party nor any person on his behalf hath paid; but the same strictness is not required on an intermediate order; *Ex parte* Murray, *re* Smith, 1 Mont. & Ayr. 478.

By an Order of the 26th of Oct. 1685, Where any party shall ground any motion or petition on an affidavit of material witnesses to examine, &c. whereby, &c. gain longer time to examine; such affidavit to contain not only the names of the chief witnesses, but also the points to be examined to. Sand. Ord. 336.

An Order of the 1st of Feb. 1827, requires affidavits of notice of motion to advance a case. Sand. Ord. 712.

As to affidavits to support motion for a special order to amend a bill, see Orders of the 8th of May, 1825, Nos. 67, 68, and 69; Sand. Ord. 1004. To prove service of *subpænâ*, see same Order, No. 34; Sand. Ord. 998.

As to hearing appeals after the last seal, and reading affidavit of service or order for setting them down, see an Order of the 3rd of Aug. 1831, Brougham, C.; Sand. Ord. 751, and note.

Affidavits of amount of unascertained residues, see an Order of the 21st of Dec. 1833; Sand. Ord. 783-4, and an Order of 7th of Dec. 1839; ibid. 864, whether by the Registrar or Master.

The form of an affidavit for obtaining a distringas on Stock, see an Order of the 17th of Nov. 1841; Sand. Ord. 896, amended by an Order of the 10th of Dec. 1841; Sand. Ord. 898-9. And see Dan. Ch. Pr, and Mr. Headlam's additions, to Vol. 2, c. 33,—on Writs and Orders in nature of Injunctions.]

be more conveniently referred to in the books of practice; which classify the motions themselves, and treat incidentally, but fully, of the affidavits necessary for the support of each. (*a*)

(*a*) [Particularly Dan. Pr. Ch., last edit., with the additions of Mr. Headlam. See also Sand. Ord. Index *voce* Affidavit. By an Order of the 8th of May, 1845, No. 127, "All copies of affidavits are to be ready for delivery within forty-eight hours after the same are bespoke." Sand. Ord. 1020.]

APPENDIX.

FORMS OF INTERROGATORIES.

In Chancery. Interrogatories to be administered to witnesses to be produced sworn and examined in a certain cause now depending and at issue in Her Majesty's High Court of Chancery at Westminster, wherein A. B. is complainant and C. D. and E. F. are defendants, on the part of the said complainant (or *defendants.*)

1st INTERROGATORY. Do you know the parties complainant and defendants in the title of these interrogatories named, or any, or either and which of them, and how long have you known them respectively, or such of them as you do know? Declare the truth and your utmost knowledge, remembrance, and belief therein. (Or, Declare the truth of the several matters in this interrogatory inquired after, according to the best and utmost of your knowledge, remembrance, information, and belief, with your reasons for such belief, fully and at large.) (*a*)

* * * *

Last INTERROGATORY. Do you know, or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or to the matters in question in this cause? if yea, set forth the same, and all the circumstances and particulars thereof, fully and at large, according to the best of your knowledge, remembrance, and belief, as if you had been thereto particularly interrogated, together with your reasons at large. (*b*)

(*a*) This Interrogatory is generally a mere introduction, but it is made useful when inquiries are necessary into the business, age, identity, &c. of an individual, the witness's recollection of persons deceased, information respecting persons absent, and similar matters, which are usually introduced, in general terms, here. *Ut vide supra*, p. 59, n. (*c*) *et* n. (*d*).

(*b*) [This form for the Last Interrogatory was dictated by an Order of the 21st of Dec. 1833, Lord Brougham, C., No. 32; see Sand. Ord. 786. But as to its use, *vide supra*, p. 60, n. (*b*) *et* n. (*c*), *et vide etiam*, p. 61, n. (*a*).]

A set of Interrogatories to prove a Presentation and Induction.

In Chancery. Interrogatories to be administered to witnesses to be produced sworn and examined in a certain cause now depending and at issue in her Majesty's High Court of Chancery at Westminster, wherein by original and amended bill A. B. and C. D. (the said C. D. being an infant under the age of twenty-one years by E. F. his next friend) are complainants, and G. H. and I. his wife, and K. L., &c. are defendants; and wherein by supplemental bill the said A. B. and C. D. are complainants and the said G. H. and I. his wife, &c. are defendants, on the part of all the said defendants except the said defendant K. L.

1st INTERROGATORY. Do you know the parties, &c.

2nd INTERROGATORY. Look upon the several paper or parchment writings now respectively produced and shown to you at this the time of your examination marked with the letters A. and B.; whether or no, were or was, the said produced writings or either and which of them at any time and when signed, sealed, and delivered, or in any and what manner executed by any person, and whom, in your presence, and is your name set and subscribed as a witness thereto, or to either and which of them, of your own proper handwriting? Declare, &c.

3rd INTERROGATORY. Look upon the two several paper or parchment writings now produced and shown to you at this the time of your examination, marked respectively with the letters ( ); Whether or no is the seal appendant to such papers or parchments, the proper seal of the Bishop of , and did the complainant receive institution according to the effect of such paper or parchment writings, or either and which of them, at any time and when, and from whom, and for what reason did he more than once receive such institution, if he did more than once receive the same? Declare, &c.

4th INTERROGATORY. Look upon the two several paper or parchment writings now produced, &c.; whether or no is the seal

appendant to such two several paper or parchment writings, or either and which of them, the proper seal of the Bishop of , or is the name set or subscribed thereto, or to either and which of them the proper handwriting (*a*) of the said Bishop, and was the same so set or subscribed to such two several paper or parchment writings, or either and which of them, in your presence, and is your name set and subscribed as a witness thereto, or to either and which of them, of your own proper handwriting: and of whose handwriting is the indorsement on the back of the said writings respectively, or either and which of them; and was the same written on such two several papers or parchment writings, or either and which of them in your presence; and is your name subscribed as a witness of your own proper handwriting? Whether or no was the complainant at any time and how often and when and by whom inducted into the possession of the parish church of in your presence, and in the presence of any other person or persons, and whom, under and by virtue of such mandates, or either and which of them; and was he or not twice inducted thereto. If yea, for what reason was he twice so inducted? Declare, &c.

Last INTERROGATORY. Do you know, &c.

J—— L——.

N. B.—It is necessary that every set of Interrogatories, (except those settled by a Master,) should be signed by a Barrister; this set (with a different heading,) and the following one, bear the signature of Sir John Leach, when at the Bar. (*b*)

(*a*) "It is not known whether the mandate is by seal or signature, and the interrogatory therefore applies to both cases. If by seal, the officer will prove it; if by signature, the subscribing witness, (if any) or otherwise some person who saw it written. The fact of Induction must be proved by a person present." *Marginal Note of the Draftsman.*

(*b*) [For the Order, that "all interrogatories" should be drawn, or perused, and signed by Counsel, *vide supra*, p. 54, n. (*b*).]

A set of Cross Interrogatories.

In Chancery. Interrogatories to be administered to and for the cross-examination of A. B., a witness to be produced, sworn and examined *de bene esse* in a certain cause now, &c., pursuant to an order of the Lord High Chancellor, made in the said cause, bearing date, &c.

1st INTERROGATORY. [As to knowledge of parties;] and did you or not know H. L. of, &c., the testator in the pleadings of this cause named, and when, or about what time did he die? Declare, &c.

2nd INTERROGATORY. Whether or no did any dispute, litigation, or controversy at any time and when particularly, and whether or not in or about the year 1789, subsist between the said testator H. L. and the said defendant S. G.? if yea, were the matters which were the subject of such dispute litigation or controversy submitted to the arbitration of any and what particular persons, and especially whether or not of the Rev. J. M. B., the Rev. D. B., and J. W., a Lieutenant of her Majesty's Navy, in the pleadings, &c.? If yea, was you examined as a witness before such arbitrators as aforesaid and did you or not declare upon your oath, or swear before such arbitrators or any and which of them anything and what as to the said defendant S. G. having or not having been married, or pretended to be married, to the said H. L., or as to the marriage ceremony having or not having been read unto or passed between them by or in the presence of any person habited as, or appearing for any and what reason to be, a Clergyman, in your presence, and as to the said H. L.'s having or not having received any sums or sum of money from the said defendant S. G. in your presence, or respecting either and which of such monies? and set forth all and every the particulars thereof as fully as you can recollect the same; and in particular did or did you not swear or declare or signify on your oath before such arbitrators, that the marriage ceremony had been read or performed unto or between the said H. L. and S. G.

in your presence by a person habited as, or appearing for any and what reason to be a Clergyman, and that the said H. L. had received of the said defendant S. G. some and what sum of money in particular in your presence, or to any such or the like effect? and if so did you give your testimony or evidence respecting such monies aforesaid uncorruptly or not, and were any and what entreaties or persuasions made use of to govern or influence you therein by any and what persons or person and when and where and in whose presence? and set forth all and every the particulars thereof if any such were made. Declare, &c.

3rd INTERROGATORY. Whether or no are you in any and what degree related or of kin to the defendant S. G.? Was you or not from any and what age or for and during any and what length of time brought up, educated, and maintained by or at the expense of the said defendant S. G. Did you at any time, and when, enter into her Majesty's service as a Midshipman in the Navy, or in any and what other capacity? and if so, did the said S. G. advance or expend any and what sums of money, to a large or any and what amount, in fitting you out upon that occasion or in defraying the expenses incurred thereby, and did she or not, at or during any and what times or time afterwards, supply you with any money for or towards your support maintenance or expenses, and in particular was she or was she not in the habit so doing for any and how long time? Whether or not was you at any and what time in any and what degree dissipated or extravagant in your manners and habits of life, and did you or not incur expenses beyond or exceeding the income you was possessed of or had any and what reason to expect? Did the said defendant S. G. for such or any and what reasons or reason or otherwise and how, refuse to continue to support or assist you with money, or supply you with any and what particular sums or sum of money, or with any more money, or to answer any and what drafts or bills drawn on her by you, or make any such or the like refusal? If yea, was you or not in any and what manner exasperated or displeased by the said defendant's having so refused or declined as last aforesaid,

and have you or not in consequence thereof or otherwise and from what reason and with what view, lately and when first declared or expressed that the evidence or testimony which you gave before the Arbitrators named in the said 2nd Interrogatory on such occasion as therein mentioned, or any and what part thereof, was false or untrue or contradicted the same, and would you or not have so done if the said defendant had supplied you with such money as you required or wanted from her or if she had answered or paid such drafts or bills as you have drawn or might have drawn on her? and set forth why you did not sooner contradict such testimony or evidence as you gave before such Arbitrators as aforesaid if the same had been untrue or false. Declare, &c.

4th INTERROGATORY. Whether or no have any endeavours or any and what means or persuasions been made use of by any and what persons or person and on whose behalf, to induce you to contradict or falsify, or to endeavour to contradict or falsify, all or any and what part of such testimony or evidence, if any, as you gave before such Arbitrators as are in the 2nd Interrogatory named, and on such occasions as are therein mentioned? If yea, set forth all and every the particulars of such endeavours, means, and persuasions, and when and by whom and on whose behalf the same were used or exerted;—and in particular set forth whether you or any person on your account, or for your use, have or hath or not received, or whether you have or not been promised, or do or not, and why, expect to receive from or by any and what person or persons, any and what sum or sums of money, or other gratuity or reward, for contradicting or falsifying, or endeavouring to falsify or contradict, all or any and what part of such testimony or evidence (if any) as was so given by you as aforesaid. Declare, &c.

J. L.

The cross-examination of witnesses in a Court of Equity is in all cases a very dangerous experiment, and in this particularly so. I have prepared, after much consideration, a draft of Interrogatories for the cross-examination of the plaintiff's witness, W. Davis, as to all such points to which in my judgment he ought to be interrogated on the part of the defendant.

J. L.

Interrogatory to examine a person pro interesse suo, *pursuant to an order.*

In Chancery. Between H. R. an infant, by J. M. his next friend - - - - - - - - - *Complainant.*
and
T. J. W. and J. S. B. - - - *Defendants.*

An Interrogatory to be exhibited to G. R. of ——, before C. C. Esq., one of the Masters of this honourable Court, for the examination of the said G. R. *pro interesse suo* in certain premises in the pleadings in this cause mentioned, pursuant to an order of this honourable Court, bearing date ——, made on the petition of the said G. R.

Have you any and what estate, right or interest, in or to the premises in the pleadings in this cause mentioned, situate in ——, or the rents and profits thereof, or in any and what part or share parts or shares thereof? If yea, Set forth the nature and extent of such your estate right or interest, and how and in what manner you make out or derive the same. Declare, &c.

Interrogatories in a Tithe-cause, under a Decree.

[*Prior to the Abolition of the Jurisdiction in Equity of the Court of Exchequer.*]

In the Exchequer. Between T. M. - - - - *Complainant.*
and
F. S. and J. T. - - - - *Defendants.*

Interrogatories to be exhibited before J. S. Esq., the Deputy to his Majesty's Remembrancer of this honourable Court, for the examination of the said defendant C. P. *pro interesse suo* in certain estates in the pleadings in this cause mentioned, pursuant to an order made by the said Court bearing date, &c.

1st INTERROGATORY. Set forth a full, true, and particular account of the lands, tenements, and premises situate in the parish of, &c., in the county of, &c., in the pleadings of this cause named and the titheable places thereof which were occupied by you or either and which of you, in each year respectively from, &c., and of the nature of such lands and tenements and premises, and particularly whether the same were arable or pasture land, and of the quantity of each kind thereof, and for how long the same were so occupied by you or either and which of you. Set forth, &c.

2nd INTERROGATORY. Have or hath not you or either and which of you since the beginning of, &c., cut or taken from off the lands, tenements, and premises, in the first Interrogatory inquired after divers or any and what quantities of wheat, barley, oats, peas, beans, vegetables, or other and what corn, grain, or seed, or divers or any and what quantities of clover, and other grass, and hay, and of hemp and flax? If yea, set forth a full, true, and particular account of the number of acres or other measure of such wheat, barley, &c., and of each of such matters and things respectively in each year *per* acre. Set forth, &c.

3rd INTERROGATORY. Have or hath not you or either and which of you since, &c., kept, fed, or depastured, upon the lands, tenements, and premises in the 1st Interrogatory inquired after, or elsewhere within the said parish of, &c., or the titheable places thereof, any barren or unprofitable cattle? If yea, set forth a full, true, and particular account of all such barren and unprofitable cattle which were kept, fed, or depastured, by you, or either and which of you, in each year since, &c., and set forth and distinguish the number and species of such cattle, and for how long the same respectively were so fed, &c., by you or either and, &c., within the said parish or the titheable places thereof and the value of the assessments thereof. Set forth, &c.

4th INTERROGATORY. Have or hath not you or either and which of you since, &c., kept, fed, or depastured, upon the lands, tenements, or premises, in the 1st Interrogatory inquired after, or elsewhere within the said parish of, &c., or the titheable places thereof, any sheep which

produced any lambs or wool, or any cows which produced milk or calves, or any mares, sows or other animals which produced any foals, pigs, or other young? If yea, set forth a full true and exact account of the number of sheep so kept, fed, or depastured, by you and each of you, which in each year since, &c., and of the quantity and value of the wool thereof in each year, and of the milch cows so kept, fed, and depastured, by you, or either and which of you, in each year since, &c., and of the quantity of milk produced by them in each of such years, and of the value of such milk, and set forth a full, true, and exact account of the number of lambs, calves, foals, pigs, and other young produced in each year since, &c., by the sheep, cows, mares, sows, or other animals so kept, fed, or depastured, by you, or by either and which of you, and of the value thereof. Set forth, &c.

5th INTERROGATORY. Have or hath not you or either and which of you since, &c., had growing, renewing, arising, and increasing, within the said parish of, &c., or the titheable places thereof, any cabbages, turnips, potatoes, apples, pears, plums, or other plants, roots, or fruits, or any and what other titheable matters or things not in these Interrogatories inquired after? If yea, set forth a full, true, and exact account of all such titheable matters and things in this Interrogatory inquired after, as far as you or either and which of you had in each year since the beginning of the year, &c., growing, renewing, arising, or increasing, within the said parish, or the titheable places thereof, and the particular species thereof, and the quantities and values thereof in each year respectively. Set forth, &c.

J. B.

This set was drawn by the late Mr. Bell.

A Set of Interrogatories, to prove the validity of a Will and Codicil, (a) upon a Bill to perpetuate testimony.

1st INTERROGATORY. [As to knowledge of parties, and testator.]

2nd INTERROGATORY. Do you know whether the said P. A. did in his lifetime make and publish his last will and testament in writing under his hand and seal or not; If yea, Look upon the will or writing now produced and shown to you at this the time of your examination and marked with the Letter (A). Do the words following, that is to say, [here set forth the will, and the attestation thereof, *verbatim*] contain or express the last will and testament of the said P. A., or not, as you know or believe? have you or not at any time and when compared or examined the words set forth in this Interrogatory as and for a copy or transcript of the said produced will or writing? if yea doth the same agree therewith, or in any and what manner differ therefrom? Declare, &c.

3rd INTERROGATORY. Look upon the will or writing now produced and shown to you at this the time of your examination, and marked with the letter (A), purporting to be the last will and testament of the said P. A. deceased; do you know or are you acquainted or not with the character or manner of handwriting of the said testator? did you see the said P. A. deceased, in his lifetime sign and seal, and hear him publish and declare the same, as and for his last will and testament, or otherwise and how execute the same or not? Were you present and did you set or subscribe your name as a witness to the execution of the said produced will, or writing, or not? and are you by any means and how acquainted with

(a) [Made before the 1st of Jan. 1838, *vide supra*, p. 182, *et seq.*]

the character or manner of handwriting of the (other) witnesses to the said will or any or either of them, and are such witnesses respectively living or dead, and, if dead, when and where did they or any of them die? and did you and such other witnesses or any and which of them, set or subscribe your and their, or any and which of their, names, as witnesses or a witness thereto in the presence of the said testator or not? Is your name set or subscribed as a witness to the said produced will or writing of your own proper handwriting; and of whose handwriting are or is the names or name of the other witnesses thereto or any and which of them, as you know or believe? and what persons by name were present at the time of the execution of the same; and was the said testator at the time of the execution of the said produced will or writing of sound memory and understanding or not, as you know or for any and what reasons or reason believe? Declare, &c.

4th INTERROGATORY. Do you know whether the said P. A. did in his lifetime make a codicil to his last Will and Testament or not? Look upon the codicil or writing now, &c., and marked, &c. Do the words and figures following, (*i. e.*) [here set forth the Codicil *verbatim*] contain and express such codicil so made by the said P. A. or not? Have you at any time, and when, compared and examined the words and figures set forth in this Interrogatory as and for a copy or transcript of the said produced writing or codicil or not? If yea, doth the same agree therewith or in any and what manner differ therefrom? Declare, &c.

5th INTERROGATORY. Look upon the Codicil or writing now produced and purporting to be a codicil to the last will and testament of the said P. A.; Were you present as a witness and did you see the said P. A. in his lifetime sign and seal, and hear him publish and declare the same as and for a codicil to his last Will and Testament, or otherwise, and how execute the same, or not? and what other persons were witnesses to the said produced codicil or writing? are such witnesses respectively living or dead, and did you and such other witnesses

or any and which of them respectively set and subscribe your and their or any and which of their names as witnesses thereto in the presence of the said testator or not? And what persons were present at the time of the execution of the said produced codicil or writing, and are you by any means and how acquainted with the character or manner of handwriting of other witnesses thereto or not? Is your name set or subscribed as a witness to the said produced codicil or writing of your own proper handwriting or not; and of whose handwriting is or are the names or name of the other witnesses thereto or any and which of them respectively, as you know or believe? And was the said testator at the time of the said produced codicil or writing, of sound mind, memory, and understanding or not, as you know, &c. Declare, &c. (*a*)

Last INTERROGATORY. Do you know, &c.

(*a*) [As to Wills made since, or subjected to, the stat. 7 Wm. 4 and 1 Vict. c. 26, (which affects all Wills made since the 31st of Dec. 1837,) *vide supra*, p. 182, *et seq.*]

INDEX.

ABATEMENT, OF SUIT,
depositions taken during, under a commission, how affected by, 127 *a*.
not suppressed, 222 *e*.
ABBEY, chartulary of, 169 *e*.
ABBREVIATIONS,
in office copy of a bill in Chancery, objections to its use at law, 150 *f*.
ABODE of witness, note of,
to be delivered to the other side, 469 *b*.
ABROAD,
facts arising, evidence of, how obtained, without the expense of a commission, 254 *e*.
will made proved here, 182 *b*.
will taken to be proved, 115 *c*, 182 *b*.
document sent, with commission to examine, 120 *f*.
attesting witness being, proof to let in proof of handwriting, 174 *b*.
attesting witness being, practice as to proving will, 265 *a*.
attesting witness being, handwriting proved without sending out a commission, 264 *e*.
attesting witness being, proof of his handwriting admitted, 251 *g*.
shopman being, entry by him not available, 314 *e*; see *Servants*.
witness having set out to go, 252-3 *a*
affidavit sworn, 541 *f*.
examination of witnesses, *de bene esse*, 124 *g*.
soldier under orders to proceed, examined as a witness *de bene esse*, 121 *g*.
sentence in a Court, exemplification of, 154; see *Attesting Witness*, *Enemy's Country*, *Handwriting*.
colonies, &c., 125; see *Colonies*.
counsel, in a foreign country, India.
see *Absent Witness*, 133; see also, *In perpetuam rei memoriam*.
ABROAD, COMMISSION TO EXAMINE WITNESSES, 112.
at law, witnesses being out of jurisdiction sufficient ground, 112 *b*.
at law, either party entitled to, 112 *g*.
how far a legal proceeding, 115 *g*.
discretion exercised by the Court, 115.
as to subject matter, 116.
places or countries to which sent, 116.
on certificate of the Master, 502 *e*.
time to apply for, 117.
to obtain evidence for an action, 117 *e*.
may be issued by the Court of Law, to which the Court of Equity has sent an issue, 118 *a*.
form of order for, 118.
striking commissioners names, *ib*.
to discredit witness, objection to, as likely to cause delay, 208-9.
witnesses being foreigners, 119.
execution of, 120.
when witness refuses to be examined under, certificate of the commissioners, 251.
executed and returned, new commission granted, 222 *c*, 223 *b*.
see *Cross-examination, time for*.
ABSENCE of witness, what sufficient evidence of, to let in the use of his depositions on interrogatories, at law, 143 *e*.
of a witness, proof by hearsay insufficient to let in his depositions, 304 *e*.
of a witness, as letting in secondary evidence, 251 *g*.
of a witness, proof of, 252 *c*, collusive, 252 *e*.
of the best witness, excuse for, 255; see *Bank of England*, *Cashier of*.
ABSENT witness, 132 *c*, 133, 142 *a*.
see *In perpetuam rei memoriam*.
proof of due search for, 263.
ABSTRACT of a deed, not secondary evidence of it; *à fortiori* copy of abstract, 271 *b*.

ABSTRACT—*continued.*
of title, use of, (along with other things,) as secondary evidence, 271 *b.*
admissions and statements in the margin of, 460.
ACCESS; see *Document, Inspection, Production, Registers.*
or non-access, now proved like any other fact, 475 *c.*
paternity presumed from, 479 *d*, see *Impotency, Legitimacy, Paternity, Medical Men.*
ACCIDENT, in cases of, rules as to evidence relaxed in, 6 *a.*
preventing proof of matters of account, rules as to evidence relaxed, *ib.*
cases of, relief in, 196.
or surprise, grounds for leave to re-examine a witness, 200.
ground for jurisdiction, affidavit to prove, 539 *b*
ACCEPTANCE; see *Advantageous Offer.*
of testator proved as an exhibit, not sufficient evidence for the plaintiff in a creditor's suit, 491 *a*; see *Stock.*
ACCEPTOR of a bill: see *Declarations by.*
ACCOUCHEUR deceased, note made by, of the receipt of payment for attending at the birth of a child, evidence of age, 309 *h.*
ACCOUNT presumed to be written at the time of the date, 288 *g.*
proof of, 185-6.
not taken at the hearing, 240.
no evidence as to, then admissible, *ib.*
particulars of, Court cannot then enter into, *ib.*
evidence as to, ought not to be entered into at all before the hearing, 503 *d.* 508 *b.*
admissions as to, matters of, paper read as a charge, to be read as a discharge, 467 *a.*
ACCOUNTS, &c., written or signed by an agent, duly authorized, adopted, though not written or signed, by the person himself, thereby charging himself, admissible, after his decease, as declarations, &c. 310 *b.*
written or signed by such agent, available, though he be still living, 310 *b.*
as written declarations against interest of persons deceased, available, though the persons who paid the monies are still living and examinable, 310 *b.*
prior to the late Order, 490 *a*; see *Preliminary Accounts.*
matters of, Inquiries as to, before the Master, 513 *et seq.*, *b.*
and Inquiries, preliminary, Order as to, 489-90.
Order for taking,—in Chancery,—in the Exchequer, form of, 514.
disputed, it becomes necessary to resort to interrogatories, 515 *c.*
in form of Dr. and Cr., to be brought in before the Master, 514-15.
new form of, before the Master, 515 *a.*
ACCOUNTS—*continued.*
but old form having been used, the party bound by acquiescence, 515 *a.*
Master in taking, to make, to all parties, all just allowances, 514 *a.*
in taking formerly, accounting party examined, 514 *c.*
process of taking, before the Master, 515 *d.*
verification of items in, under special circumstances, 195.
in taking, after 49 years, special directions as to evidence, 196 *a.*
in taking, instances of evidence specially admitted, 515 *f.*
schedules of, conclusiveness of dates mentioned in, 517 *c.*
taken in before the Master, verified by affidavit of the party, 515 *b.*
in taking before the Master, use of evidence not allowed to be read at the hearing, 537 *a.*
settled, stated in the answer, but not proved, an inquiry as to, 490 *c.*
between solicitor and client, re-opening of, 512 *f.*
settled between banker and customer, pass book not evidence of, 310 *b.*
book, when and why not proveable at the hearing, as an exhibit, 189 *h.*
books, party reading part charging the other, the latter may read the part discharging, 467.
see *Book, Loss of Books, Documents, Production.*
matters of; see *Declarations, Entries, Statements written, Defendant's right to discharge himself, Goldsmiths', Merchants', Parish Overseers', Partnership, Rent, Steward, Viva voce, power of Master to examine.*
ACCOUNTING PARTY, relief to, in certain cases, 6 *a.*
in the Master's office, right to discharge themselves of sums under 40*s.* each and 100*l.* in all, by his own oath, 364-5.
to bring in the accounts in the form of Dr. and Cr., &c., 506 *b.*
may be examined, upon interrogatories, as the Master shall direct, 515 *a.*
examination of, on a Reference, 506 *b.*
ACCOUNTING; see *Executor.*
ACCUMULATIVE, several legacies being, when presumption against arises, parol evidence to rebut or support it, 294 *c.*
several legacies being, presumption, by the civil law, might be rebutted by evidence, 296.
ACKNOWLEDGMENT, nature of, observations of Sir D. Evans as to, 457 *b.*
in writing, of great weight; but may be impeached, 457 *b.*
of a child, register of baptism evidence of, in the Ecclesiastical Courts, 307 *f.*
of a married woman, before a British Consul, 254 *f.*
of deeds enrolled, effect of, 417-18.

ACKNOWLEDGMENT—*continued*.
under the Act for abolishing fines and recoveries, 418 *b*.
before whom may be sworn or affirmed, Order as to, 541 *g*.
see *Declarations, Entries in books, Trusts*.
of a right; see *Release*.
ACQUIESCENCE, by heir-at-law, effect of, 184 *d*.
under secondary evidence, 271 *a*.
when, equivalent to an admission, 459 *b*.
of party, in an account before the Master, taken according to the old form, 515 *a*; see *Acknowledgment, nature of*.
ACQUIRING of Property, by testator, extrinsic evidence of, to explain a will, 283 *a*.
ACQUITTAL not evidence, 434 *c*.
in Excise matter, 436 *b*.
ACT OF GOD not prejudicing a party, instances of, 225 *a*; but see *Witness, Dying*.
ACTS OF GOVERNMENT, known and understood by the Judge, 399.
ACTS OF OWNERSHIP, proof of, to show a right, 236 *e*.
ACTS OF PARLIAMENT, citation and proof of, 401 *b*.
date of, 407.
distinction of, into Public and Private, 404-5 *d*.
Private, Local, and Personal, but of a public nature, 408.
Local and Personal, to be judicially taken notice of, &c., *ib*.
copy of, printed by her Majesty's printer, made evidence; but yet the Act not Public, 405 *f*.
stat. 8 & 9 Vict. c. 113, as to printed copies of, does not extend to Scotland, 410 *e*.
one presumed, 484 *d*.
see *Illegitimate, Parliament, Statute*.
ACTION, pending, proof of, by production of verdict, or *nisi prius* Record, with *postea* indorsed, 258 *f*.
directed by the Court to be brought, 492 *a*.
at Law, directed to be brought, 524.
default in bringing, 524-5.
any person on whose immediate and individual behalf any action may be brought or defended, still incompetent, 327 *b*.
over, right of, against witness, 362.
and Suits, limitations of, 476 *c*.
ADDITIONAL Commission, procedure when one required, 96-7 *a*, 127-8.
Evidence, permitting (or ordering) the parties to procure, 489.
on a Rehearing, 536.
Examination of a witness, already examined, order necessary, 201.
Fact, not put in issue, not allowed to be proved, 231 *d*, *e* and *f*.
Witnesses, examination of, with a view to discredit one witness, 209 *d*.
ADEMPTION OF LEGACY, by subsequent portionment, presumption as to, 297.
parol evidence to rebut or fortify, 297 *c*.
ADEMPTION OF LEGACIES, from parents, or persons *in loco parentis*, to children or issue, 298.
effect of rule as to, 299.
ADJOURNMENT of the hearing of a cause, in order to supply defects or omissions of evidence, 197-8-9.
of proceedings, under a commission to examine witnesses, 109.
ADMINISTRATION, Letters of,
copy of Record of Ecclesiastical Court, 154 *b*.
letters of, no proof of marriage, 444 *b*.
nor of death, 250 *a*, 444 *c*.
nor of kinship, *ib*.
grant of, proof of, 414.
in proof of, grant of, seal of the Ecclesiastical Court, 414 *a*.
exemplifications of, form of, 414.
exemplifications of several, but one stamp requisite, 414 *g*.
ADMINISTRATIONS, sentences of the Ecclesiastical Courts as to, 442. *et seq*.
ADMINISTRATION SUIT, Order for the preliminary accounts and inquiries in, effect of, 490 *a*.
ADMINISTRATOR,
as to incompetency of, 357.
examination of a party being, 340 *b*.
in trust, party being, 340 *b*.
durante minori ætate, or *pendente lite*, 358.
admission by, sufficiency of, 460 *b*.
admissions by, which bind him, as representing the intestate, 464 *b*.
see *Inability to Purchase*.
ADMIRALTY, COURT OF,
rules as to evidence, 4 *a*.
examinations in, 258 *g*.
not binding a witness down to precise words, 472 *a*.
sentence in, when libel lost, 163 *c*.
judgment of the Masters of the Trinity House, sitting in, 470 *a*.
affidavits in, caution used as to, 540 *c*.
proof of tender in, 243 *b*.
ADMIRALTY COURTS,
sentences of, upon questions of prize, 445.
foreign, sentences of, 445 *f*.
foreign, sentence in, appeal from, 445 *g*.
foreign, what not recognised, 445 *h*.
French, *arrêt* in, 164 *b*.
see *Collision, Destination*.
ADMISSIBILITY,
of declarations or statements by persons deceased, a question for the Judge, 325 *b*; see *Credibility*.
of depositions in other suits, for and against other parties, 259-60.
of ancient documents, determined by inspection, 453.
ADMISSION,
actual and constructive, how presented to the Court, 212 *a*.

ADMISSION—*continued.*
made by agreement, 47 *et seq.*
made for the purpose of the suit, 457.
and examinations, effect of, on the Court, 456, *et seq.*
by which an object has been gained, binding, 461.
of fact, distinguished from one of law, in answers, 18.
of matter of fact, even stronger than if it had been determined by a jury, 456 *c.*
in the pleadings, 9.
in the pleadings, examinations of defendants equivalent to, 506 *b.*
plenary, partial, or qualified, 22.
in answer, to save expense, 11.
in answer, to serve as estoppel, *ib.*; see *Answer, Executor.*
in answer, as to documents craving reference to, 11 *e.*
in answer, effect of, how far may be neutralized, 14.
in answer, how framed formerly, 15.
in answer, lets in the use of secondary evidence, 12 *a.*
in answer, use of, letting in secondary evidence, 269 *d.*
amendments of, most sparingly admitted, 18.
as to obtaining permission for, 18 *c.*
in his answer, of a party, in possession, 468 *c.*
in his answer, defendant not allowed to disprove, 428 *b.*
in writing, in answer of defendant, as to secret or imperfectly expressed trusts, authorizing parol evidence, 293-4.
to supersede the necessity for examining attesting witnesses to, 175-6.
answer in Chancery being considered, at law, as an admission only, effect of, 468 *c.*
parol, as to contents of written instrument, admissible, 456 *c.*
in evidence of certain documents, act to facilitate, 157; see *Statutes.*
of the execution of a deed, or other exhibit, effect of, 48 *a*, 49 *b.*
of a copy, not admission of the execution, 146 *c*, 172 *f.*
of secondary evidence of a deed, &c., how far dispensing with proof of execution, 272 *f.*
Master may act upon, 505 *g.*
certifies as to, 505-6.
or waiver of objection, valid, although no consideration, 48.
signature of the solicitor sufficient, 48 *b.*
his authority is inferred, 48 *c*, but essential, 47 *b*, 49.
and waivers controlled by the Court, 49.
not effectual to remove an objection for want of a proper stamp, 49 *c.*
directed to be made on the trial of an Issue, 525.
contrary to the pecuniary interest of those making them, evidence of, admissible, 313 *d.*

ADMISSION—*continued.*
of parties between whom any confidence, or trust, exists, 430 *c.*
of a will, by the heir, effect of, 180 *a.*
by the heiress, a *feme covert*, *ib.*
which have been acted upon, 460.
of an agent, generally, 464; see *Agent.*
by an agent but not as agent, not binding on the principal, 464 *c, ad finem.*
of a person represented, bind the representative, 463 *g.*
by a wife, 344-5.
by a witness, to his own disadvantage, as to payment, or release, or offer, 375 *c.*
of guilt, not inferred, from an objection to answer, 83 *j.*
of conclusions of law, evidence of, must be put in issue, 230 *a.*
but of matters of fact otherwise, 456 *b.*
and conversations, evidence of, not admissible, unless the attention of the adverse party has been called to them in the pleadings, 229 *a*, 230 *a.*
naked, letters used as evidence of, need not be put in issue, 456 *b.*
offer of a compromise not such, 465 6.
by Counsel, 458-9.
idle or unguarded, 463.
see *Log-book of a Ship, Matters Admitted, Matters Admitted, &c. in the Pleadings, Notice, Allegation of, University, Books of.*
ADULTERY, evidence of, not admissible to support allegation of mere misbehaviour, 233 *d* and *e.*
ADVANCE TO A CHILD, by a testator, how far an ademption of legacy, 297 *e.*
ADVANCEMENT,
purchase by a father in the name of a son, under the circumstances, not being such, 315 *a.*
in case of, as to rebuttal of trust, by parol evidence, 292 *b.*
ADVANCE of money, by a solicitor to a client, evidence of, 512 *f.*
ADVANCES, character of, loans or gifts, 462 *a*; see *Ademption of Legacy, Equitable Mortgage.*
ADVANTAGE, undue, having been taken, *onus probandi*, 390 *a.*
ADVANTAGEOUS OFFER presumed to have been accepted, 478 *f.*
ADVERSE POSSESSION, title depending on, 485 *e.*
ADVERSARY; see *Party.*
ADVERTISEMENTS,
necessary on a reference, 502.
for creditors, heirs-at-law, next of kin, &c., 510-11.
ADVERTISING, rules of, 511 *b.*
ADVISE UPON EVIDENCE, instructions for Counsel to, 73 *a.*
AFFAIRS, STATE, privileged from inconvenient disclosure, 377.
ADVOCATES, restricted in their testimony, 378.

ADVOCATE, privilege of, 380 *g*.
ADVOWSON, right of, in the parishioners, proof of, who to vote for the minister, 281 *c*; see *Appointment, Articles, Bishop's Register, Parson, Patron, Presentation, Tithes.*
AFFIDAVIT, 538, *et seq.*
title of, 543 *c*.
form of, 543.
to be taken and expressed in the first person, of the deponent, Order, 512 *f*, 543 *b*.
so that perjury may be assigned on it, 540 *c*.
indictment for perjury in, 150 *f*.
drawn up for and sworn by illiterate and ignorant persons, 495 *d*.
prepared for, and made by, a person illiterate and ignorant, as to discrepancies in, *also* observations on, by Lord Langdale, M. R., 540 *b*.
as to words spoken, the adding therein—"or to that effect" is but a proper caution, 540 *c*.
by a marksman, signed by him, hand having been guided, bad, 186 *c*.
copies of, Order as to, 546 *a*.
prolixity in, 229 *c*.
scandal, impertinence, or prolixity in, 544-5.
before whom may be sworn, Order as to, 541 *e*
by a Peer, must be sworn, 541 *a*.
Office, 543.
filing and registering of, Order as to, 543-4 *a*.
in Chancery suits, filed since time of Charles I. still extant, 151.
when allowed to be taken off the file, 544 *b*.
being contrary, as to personal examination in Court, 495 *c*.
against affidavit not to be taken, order as to, 511 *c*.
"not taken by virtue of any Order of this Court," dislike of the Court to, and Master not to use such, 502 *c*.
voluntary, unrecognised, 540 *g*.
Orders (Bacon, C.) as to, 511 *c*.
evidence by, examination in Chancery little better than, 75.
ex parte, cross-examination wanting, 540 *a*.
testimony by, the value of, 472 *a*.
though whole of, read, as to credit due to parts only, 467 *e*.
what available, on motion for production of documents, 30 *h* and *i*.
as to any irregularity, 219.
made and used in a cause, may be used again, 544 *b*.
in original suit, may be used in supplemental, 537 *e*.
in one cause, not to be used in another, 540 *e*.
used admissible against the user in another action, at law, for the same purposes, 462 *a*.
in another suit, 430 *d*; see *Secondary Evidence.*
AFFIDAVIT—*continued.*
in what cases required to accompany a bill, 538 *e*.
with bill when necessary, 538-9.
to be annexed to a bill for the preserving or perpetuating testimony, 131 *l*.
to accompany bill for an injunction, suggestion by the Commissioners as to such, 17.
to be annexed to a bill to examine *de bene esse*, 123 *a*,
to a bill to perpetuate testimony, 131 *b*.
to support motion for commission to examine witnesses abroad, 112,
to support motion to be allowed to examine witnesses to discredit others, not always necessary, 205 *c*.
of a surgeon, to warrant examination of a witness *de bene esse*, 121 *d*.
to support application for leave to examine a witness *de bene esse*, 123 *a*.
to examine witness *de bene esse*, as to the witness, 121 *d* and *h*; as to his evidence, 121 *h*.
on motion for publication of depositions *de bene esse*, the witness not to be found, 253.
to support, or oppose, demurrer to interrogatories, 79.
without certificates even, used to prove death, 250 *b*.
to verify items in account, under special circumstances, 195 *h*.
of material witnesses to examine, Order as to, 113 *b*.
on application for commission to examine witnesses abroad, fuller when delay likely to be great, 117 *b*.
to prove sending out and return of a commission to examine abroad, 120 *c*.
to obtain permission to amend or alter Answer, 18 *c*.
proof of exhibits by, when available, 147.
to prove exhibit, may be made before order made, 188 *c*.
to prove exhibit, may be by one already examined as a witness, *ib*.
deed proved by, is well proved, 188 *e*.
to obtain enlargement of time for publication, 138-9 *a*.
in support of other particular motions, 545 *d*.
in reply, 544 *c*.
as to newspapers, 155-6.
not required by the Court, to induce an order that a ward shall not be taken out of the jurisdiction, 494 *b*.
as to due search for a witness not found, 253.
impeachment of credit of witness having sworn, 205 *e*.
in support of articles to discredit a witness, impertinence and scandal in, 208.
use of, on a reference, 502.

AFFIDAVIT—*continued.*
not receivable by the Master to supply defect in proof after examination *vivâ voce*, 507 *d*.
proof by, in Master's office, with consent of parties, allowed, 511.
what may be used before the Master, Orders as to, 512.
in reply, before the Master, Order as to, 512 *d*.
verifying allegations in interrogatories filed for examination of plaintiff, 512 *f*.
see *Attesting Witness, Bankruptcy, Petition in,*
to be annexed to a bill, see *Bill.*
by claimant, see *Claimant.*
see also *Clerk of Affidavits, Discrepancies in Affidavit, Plaintiff, Swearing, Supplemental Cause, Voluntary Affidavits.*
AFFINITY, see *Relation, Kinship, Pedigree.*
AFFIRMATION, by witness, 98 *d*.
as to newspapers, 155-6.
in lieu of Oaths, 332 *e*.
before whom may be taken, Order as to, 541 *e*.
AFFIRMATIVE, to be proved, 388 *c*; see *Ei, &c.*
being presumed, puts on party denying, the *onus probandi*, 389.
to be proved, effect of the rule, exceptions to it, 389.
evidence, preponderance of, over negative evidence, 388 *c*.
AFTER OR AT HEARING, see *Hearing.*
PUBLICATION, see *Publication.*
SUPPRESSION, see *Suppression.*
AGAIN, examination, see *Re-examination.*
AGAINST INTEREST, acknowledgment of a child, 317 *f*.
declarations oral or written, by persons deceased, being sufficient to render evidence of them admissible, 309 *h*; see *Declaration, Entries in Books, &c. by Persons Deceased.*
AGE, tender, of a witness, 329 *c*.
of 21 years, testator must be of, 182.
of a deed, see *Ancient Deed, Dates, Deed.*
of document, thirty years, effect of, 185.
of a will, from its date or execution, 186 *b*.
advanced, of a witness, preventing attendance at Examiner's office, 67 *a*.
advanced, of a witness, ground for examination *de bene esse*, 121 *f*.
of a person deceased, the use of declarations and inscriptions to prove, 320 *b*.
evidence of, see *Accoucheur, Entry by, in Books.*
AGED WITNESS, 132 *c*, 133, 142 *a*; see *In perpetuam rei memoriam, Witness Aged, and Witness Aged, and but just discovered.*
AGED AND INFIRM, witness being, see *Imbecile, Memory.*
AGENCY, evidence of, to render his letters admissible, 465 *b*.
when not of such a nature as to be presumed, 465 *d*, see *Agent.*
AGENT, admissions of, 464.
answer of, when read against principal, 29 and n. *e*.
declarations of, within the scope of his authority and duty, 308 *f*.
statements by, 463 *c*.
admissions or declarations by, not made in the course of his acting as agent not binding on the principal, 464 *c*.
may, within the scope of his authority, bind his principal by his agreement, and, in many cases, by his acts, *ib*.
deceased, proof of authority, &c, to let in entries by, 313 *a*.
books of, entries in, as admissions against principal, 465 *d*.
since deceased, entries in book, &c. by, 310 *b*.
when duly authorised to make or sign declarations in writing against interest of declarant, such as after decease of declarant, will be available, 310 *b*.
declarations by, made otherwise than in the course of the transaction alluded to, not admissible, *ib*.
agent employed by, declarations by, not evidence, *ib*.
letters to or from principal, but not communicated to the other party, or his agent, rejected, 465 *b*.
fact in knowledge of, to be proved by his testimony not by his mere assertion, 465.
letter of, refused, and he ordered to be examined, 465 *b*.
counsel not the party's, 458; see *Counsel.*
for a party, not to act as commissioner, 220 *e*.
law, of a party's ancestor, 187.
wife being, of husband, 344-5; see *Wife.*
communications to, not privileged, 380; see *Professional Officers, Public and Inferior, State.*
AGREED TO, see *Matter of Fact, admitted or, &c.*
AGREEMENT, certain, requiring, as evidence, writing, 276 *g*.
by the law required to be evidenced by writing, not holpen (in general) by evidence inferior, or other, in lieu of the proper evidence; nor by extrinsic, in aid of it, 276-7 *a*.
alleged in bill to be in writing, presumption of signature, 482 *d*.
although alleged to be written, when writing not required may be proved by parol, 276 *g*.
written, instances of, when parol evidence admitted, 277 *b*.
parol evidence as to, *ib*.
proof of, as stated, or the bill dismissed, 243 *b*.
as to proof of, in general, 243-4.
where letters are stated as forming, and not as proofs only, 245 *a*.

AGREEMENT—*continued.*
in writing, for a lease, parol evidence to add to, inadmissible, 277-8.
in suits for the specific performance of, use of parol evidence by defendant, 290.
in writing, variation of or addition to, by the Court, 289, *et seq.*
in writing, nature of, parol evidence to explain and show the conduct of the parties, 288 *b.*
one who has signed as an agent, nevertheless admitted to deny his own authority, 386 *c.*
denial of, not supported by evidence of performance, 232 *a.*
entered into by counsel, authority presumed, 459 *a.*
doctrine of the Court as to such, unconscionable, hard, or entered into by surprise or mistake, 290 *a.*
as to stamps on, 391 *a.*
see *Admission*, and *Without Prejudice.*
between solicitors relating to their clients' causes, 47 *a.*
to be in writing, 47 *b*; see *Letter of Agent to prove.*
by letters, see *Letters, Specific Performance, Statutes as to Frauds, Bankrupts.*
ALDERSON, MR. BARON, Observations by,—as to the use of evidence of declarations of dying persons, 315 *c.*
—on the want of an oral examination of witnesses, by which the Court (of Equity) might satisfy its conscience, 498 *d.*
—as to the difficulties resulting therefrom,
—and the costs of an issue tried at law, 498 *e*, 499 *a.*
ALIEN, plaintiff being, (when irrelevant,) not allowed to be proved, 231 *c.*
ALIMONY, decree for, use of, 161 *c.*
ALIVE, presumption as to a person being still, 474 *c.*
ALLEGATION,
in pleadings, necessary to let in evidence, to prove facts, 232 *e.*
general, may be supported by proof of particular instances, sufficiently alluded to, 233.
in the pleadings, what must be proved, 242 *d*; see *Answer, Bill, &c.*
of agreement, 243.
although unnecessary, yet being made may require proof, 244-5.
in a bill, admitted by one, but denied by another defendant, inquiry as to, 490 *a.*
in a bill, false, 16 *e*, 151.
why made and sanctioned, 427.
for confirmation of, statutory declarations, 460-1.
exception to a witness, in the civil law courts, 330 *c.*
ALLOWANCES, all just, to be made unto the parties, by the Master, in taking an account, 514 *a.*
ALMANAC, use of, by the Court, 397 *a.*
ALTERATION,
of exhibits; see *Tampering.*
of circumstances of testator (prior to 1838) raised presumptive of revocation of will, 300 *e*, 301.
in a will, (since 1837,) 452 *d.*
in a deed, by a party, against that party, 452 *e.*
AMBASSADOR, at Paris; see *Paris.*
communications from, 401.
AMBIGUITIES,
in written documents, 278, *et seq.*
patent, defined, their effect, 279.
latent, defined, extrinsic evidence to solve, 285-6 *a.*
latent, propounded and dissolved, but patent not even explained, by parol evidence, 284 *d.*
latent, which no refinement of criticism will explain, 285 *d.*
latent, from two persons or places, having same name, instances of, 286 (*b*).
AMEND THE BILL, obtaining order to, effect of, as to admitting sufficiency of answer, 26.
to put facts in issue, 27.
special order to, motion for, affidavits as to, 545 *d.*
AMENDMENT OF BILL necessary, in general, when exception for insufficiency overruled, 26.
not allowed after examination of witnesses, 28.
new commission after, 127 *a.*
for specific performance of agreement, when refused, 242-3.
AMENDMENT of State of Facts; see *State of Facts.*
AMENDING THE BILL, use of, 12, 13, 25.
AMENDING DEPOSITIONS, 105, 106 *b* and *c.*
AMERICA, no register of births, or baptisms in, entries in Bibles, &c., as to such, 319 *d.*
affidavit sworn in, 542 *c.*
notes sent out to, with commission to examine witnesses abroad, 120 *f*; see *United States, Virginia, West Indies.*
AMSTERDAM, affidavit sworn at, 542 *c.*
ANCESTOR, handwriting of, proof of, by family solicitor, 267 *b.*
ignorance of, not operating as renunciation by, 478 *f*; see *Disclaimer.*
ANCIENT BOOKS AND DOCUMENT, use of, as evidence, in tithe suits, 312 *e.*
ANCIENT DEED, above thirty years old, proof of a deed being, 189 *i*; see *Age, Date, Deed.*
ANCIENT DOCUMENTS, the admissibility of, determined by inspection, 453.
ANOTHER CAUSE; see *Cause, Cross Cause, Depositions in.*
ANSWER,
form and nature of, 10 *f*, 19.
examination of a party the same as, 518.

ANSWER—*continued.*
frequently suggests something, 518 *d*; see *Amendment.*
right of a plaintiff to a sufficient one, 12 *d.*
old system as to that of a defendant having a partial interest, 20, 20 *d.*
particularity of, orders as to, Lord Clarendon, 24.
what, not available, as precluding necessity for evidence, 28.
from information and belief is but hearsay, 430 *a.*
thereby to decline answering, 85 *a.*
which preclude the necessity for evidence, 28 *c.*
a distinct and positive assertion in, the testimony of a single witness insufficient evidence against, 227 *a.*
opposed to evidence of single witness, aided by circumstances, 523 *h*; see *Issue.*
admissions in, precluding evidence by the plaintiff, to prove the fact, or by the defendant, to prove the contrary, 267.
admitted to be true when, after replication, the plaintiff served no subpœna to rejoin, 22 *c.*
not replied to, the effect of, 428 *a.*
admitted to be true, when the cause is "heard on Bill and Answer," 22 *c.*
statements in, not contradicted by the replication, what to be proved, 238.
statements in, 238.
defence by, when, for want of enrolment, a decree is not pleadable, 422.
in form of demurrer or plea, effect as to admissions, 22.
admissions in, to save expense, and act as estoppel, 11.
admissions in, as to documents, 11.
documents come into the possession of defendant after, 196 *c.*
being proved, to let in use of depositions in the suit, may be used by the adverse party, 259 *c.*
of defendant; see *Concluded, Offer of Plaintiff to be.*
in the cause distinguished (as to reading from it) from an answer in another cause, 468 *b.*
matters stated by, but not put in issue, inquiries as to, 490 *c*; see *Fact.*
to prove admissions in, 161 *c.*
as to reading from, 15.
allegation in, read by plaintiff in, may read evidence to disprove them, 16 *d.*
reading of, by plaintiff, danger of, 429-30.
read by defendant, as to costs, 11 *d.*
being read, bill may be read, 427 *f.*
right of defendant to a bill of discovery to have his answer read at the trial, 15 *a.*
as to reading, rules, 429 *a.*
right to read parts of, 15.
reading part of, lets in such parts only as are connected with it, 467 *c.*

ANSWER—*continued.*
though whole be read, as to credit to part only, 467 *c.*
though read as charge, may not be readable as discharge, 468 *a.*
of defendant reading at law on issue directed, practice as to (whether wholesome, *qu.*), 228 *b.*
being read at law, party bound by it as evidence, but he may elect to retract and withdraw it, 468 *b*
being considered at law as an admission only, the effect, 468 *c.*
of defendants non-user against others of them, 428 *g.*
of defendant not unable, by way of an affidavit, as evidence against another, 512 *f.*
of a witness, to a bill against them, read to show his incompetency, 330 *f.*
allegation of decree in, 422-3.
effect and use of, as evidence, against the defendant, 428.
use of, at law, 428 *f.*
of a partner, use of, 464 *b*; see *Admissions.*
use of, when bill lost, 161 *c.*
to cross-bill, costs of, order as to, 95 *e.*
to cross-bill, reading and use of, order as to, 195 *e.*
want of, coming in, before, &c.; see effect of, in applications for commissions to examine witnesses abroad, 117 *c, d, e, f.*
not to be recited in Decree or Order, except Order for special injunction, 162 *f.*
of defendant, for third time insufficient, his examination, 210-11.
Office Copies of, 151 *c.*
in Chancery, since the 17th of R. 2nd, are found in the Tower, 151.
in Ecclesiastical Cous, 442 *a*; see *Bill and Answer, Admissions, Contempt, Cross Bill and Answer to, Defendants, Documents, Executor, Supplemental Bill and Answer, Witness.*

ANTE LITEM MOTEM; see *Post Litem Motam, Declarations, Statements.*

ANTIQUITY OF HANDWRITING; see *Ancient Handwriting.*

APART, witness to be examined; see *Court, Private, Secrecy, Witness.*

APOTHECARY; see *Medical Attendant, Professional Witness, Science.*

APPEAL to House of Lords, evidence on, 3 *a.*
although the House of Lords, Court of, yet it looks at evidence rejected below, 533 *e.*
from the M. R. or the several V. C.'s to the L. C., looked upon as merely a rehearing before the same Judge 536
on applications for new trial of an issue, 529 *a.*
evidence cannot be read on, which was not entered at hearing, 533 *c.*

APPEAL—*continued.*
on ground of mistake in not entering proofs as read, 534 *c.*
in general, the *onus* on the appellant, 390 *a.*
he must show the order appealed against to be clearly wrong, 537 *d.*
order of, setting down service of, affidavit of, 545 *d.*
Evidence on, 533 *et seq.*; see *Chancery Commissioners' Report of.*
APPEAR; see *Order for an Issue.*
APPOINTMENT
of a curate, right, as between vicar and a corporation, 312 *a.*
to a commission, in the army, not proveable by the Gazette, 400 *l.*
deed of, secondary evidence of, 271 *c.*
by will, (since 1837,) to be executed like other wills, 183.
under a power, by testamentary instrument, by *feme covert*, proof of, 178 *e.*
ARBITRATOR; see *Award, Bill to Impeach.*
admissions before, 459.
authority of, 426, and see *Award.*
ARCHES, COURT OF,
decree of, as to alimony, use of, 161, *c.*
examination in, as to competency and credit, 330 *e.*
exemplification from, 414 *g.*
judgment in, on appeal from Consistory Court, 442 *b.*
ARCHBISHOP OF CANTERBURY,
fiat for special license, for marriage at a private house, 253 *f*; see *Ordinary.*
ARCHDEACON'S COURT (London),
fire of, 1666, destroyed the wills in, 269 *e.*
ARGUMENT of a case sent to law; see *Chambers, Judges in.*
of a demurrer; see *Demurrer.*
ARMY DEBTS, Commissioners as to, certificate of, 438.
see *Appointment, Gazette.*
ARRANGEMENTS on first meeting of the solicitors of the parties, on a reference to the Master, 503 *b.*
ARREST, protection of a witness from, during his examination, 64 *b*; see *Protection of Witnesses.*
ARRET, in the French Admiralty Court, 164 *b.*
ART, words of, in a written instrument, explainable by parol, 280 *c.*
ARTICLES,
previous to a settlement, cannot be read to construe it, unless bill brought to rectify it, or referred to in it, 280 *f.*
ARTICLES TO DISCREDIT A WITNESS,
form of, 206.
how filed, 205 *b.*
motion to be made thereupon, *ib. c.*
order thereupon sparingly made, *ib. d.*
matter of, 207.
impertinence and scandal in, 208.
ARTICLES—*continued.*
having been exhibited, it is too late to move to suppress the depositions for irregularity, 205, *e.*
OF RELIGION, read by a rector, on his induction, presumed, 480 *a.*
OF WAR, copy of, purporting to be printed by her Majesty's printer, admitted, 400 *m.*
ASSENT; see *Acknowledgment, nature of.*
ASSERTION of the deponent, voluntary affidavit merely, 540 *g.*
ASSESSMENTS, books of, available in evidence, 168-9.
ASSETS, outstanding, Master is to inquire as to, unless otherwise directed, 516 *b.*
debt from executor to testator, such, 515 *b.*
admissions of, by personal representatives, 460 *c*; see *Executor, Administrator, &c., Examination of.*
ASSIGNEE of a bankrupt,
as to competency of, 358.
or Insolvent,
how bound by their admissions, 464 *b.*
evidence for, see *Bankrupt, entries by.*
ASSIGNEE, 156 *b*; see *Insolvent Acts.*
bound by admissions of assignor, 464.
ASSIGNMENT lost, secondary evidence of, 271 *a.*
of Term, not having been made, presumption raised, 476-7 *c.*
of Terms, Act as to, 477 *c.*
ASSISTANCE; see *Judge in Equity, Master of the Rolls, Issue at Law.*
ASSIZES, Clerk of, 159.
production of exhibit at, 192; see *Order for an Issue, Special Circumstances.*
ASSURANCE, policy of, deposit of, by way of equitable mortgage, *onus* of proving notice of, 389 *a.*
marine; see *Lloyd's List.*
ATHEIST may not be examined as a witness, 65-6 *f.*
avowed, his testimony refused, 329 *c.*
no reliance on the word of, 332 *c.*
see *Incompetency, Infamy.*
ATTENDANCE OF WITNESS,
for examination, 64.
for cross examination, 71.
to be examined under a commission executed in Scotland or Ireland, 127.*
ATTENDANT TERMS; see *Assignment of Terms.*
ATTESTATION of an instrument,
need not be proved after 30 years, 250.
of an instrument executing a power, 174 *a.*
of an instrument, inferences from proof of, 263-4 *a.*
of a will, since 1837, 182-3.
ATTESTED INSTRUMENT, why to be produced, if it be possible, 268 *c.*
must be proved by the subscribing witnesses (if alive), &c. 173-4.
executed in India; see *India.*
admission of copies of, is not admission of the execution of, 146 *c.*

ATTESTED INSTRUMENT—*continued.*
witnesses to execution of what to testify, 176 *g.*
ATTESTED COPY, of an abstract, not secondary evidence of a deed, 271 *b.*
of the memorial of the registry of a deed, 419 (*c*).
of memorandum of the assignment of a judgment, 419 *c.*
of a lost deed existing, yet nevertheless any other copy available, 268 *c.*
see *Deeds, Documents, Instruments, Wills.*
ATTESTING WITNESS,
examination of, to prove execution of deed, 189 *c.*
necessity for the evidence of, 272 *f.*
admission to preclude necessity of examining, 49 *b*, 175 *d.*
evidence of being, 174 *b.*
subscription not necessarily attestation, *ib.*
abroad, dead, incompetent, or interested, proof of handwriting of, 263 *c.*
being abroad, proof of, 174 *b.*
proof of his handwriting, 251 *g.*
being blind, yet to be examined, *ib.*
to a will, being abroad, practice as to proving the will, 265 *a.*
to a will, handwriting proved, not sufficient, unless his death also proved, 261 *d.*
alleged to be dead, still handwriting not proveable *vivâ voce* at the hearing, 189 *e.*
dead, deed how proved, 197 *f.*
to any instrument, not being a will, one only need be examined, 176.
of will of lands, or deed impeached, cross-examination of, 189 *e.*
in cases pregnant with fraud, credit of, 472 *a*; see *Credit, Witness.*
handwriting of, motion to prove after publication, 495 *c.*
of lost deed, &c., must prove its execution, 272 *f.*
of lost deed, cases where his evidence dispensed with, 272 *f.*
what sufficient testimony from, 174 *b.*
being a marksman, 174 *b.*
to a will, (under old law,) being son of residuary legatee, 349-50 *a.*
incompetency of, waived by asking him to attest, 369 *b*, and see 384 *c.*
may testify to invalidate the instrument, 386.
to insolvent petition, 174 *a.*
to a submission to an award, *ib.*
see *Deed, Instrument, Will, Subscribing Witness, Witness.*
ATTORNEY,
bond to from client, 61 *a.*
who drew the will, being one of the residuary devisees, is not decisive evidence of fraud, 474 *e.*
of a party, letters to and from, 187.
of a party, letter by, 187 *c*; see *Agent.*
admissions by, 48 *d.*
authority of, *ib.*
ATTORNEY—*continued.*
evidence of, as to existence and possession of documents, 275 *c.*
holding a deed, as security from a client, 275 *c.*
certain entries in books or bills of, although not against interest, used as evidence, 309 *g.*
deceased, entries in books of, to prove payment of money, 464 *c.*
privilege of, early instance of, 379.
agent of, to collect evidence, communications with, privilege of, 388 *e.*
restricted in their testmony, 378.
(Scotch) of a party, acting as a commissioner, 220 *e*; see *Scotland, commissions executed in.*
see also *Money Raising, Order for an Issue, Power of, Solicitor.*
ATTORNEY GENERAL, his fiat necessary to obtain production of a record, 169 *f.*
in a peerage case, used a magnifying glass, to examine the registers, 267 *c.*
to be a party to certain suits, under the stat. 5 & 6 Vict. c. 69, 135.
AUCTIONEER, parol evidence of statement by, the contract not being reduced into writing, 277 *b.*
AUDITOR OF THE COURT, assistance of, used by the Master, formerly, on a reference of matters of account, 514 *b.*
AUGMENTATION OFFICE, records in, 165.
AUNT, and Nephew or Niece; see *Relative.*
AUTHENTICITY of an INSTRUMENT, circumstances to show, 186 *f.*
AUTHOR of a work; see *Scientific Witnesses.*
AUTHORITY of Counsel, presumed, 459 *a.*
of Solicitor, inference as to, 48 *a*, 51 *e*; see *Counsel, Solicitors.*
AVERMENTS, what must be proved, 242 *d.*
such inadvertently made, 244; see *Allegations, Statements.*
AWARD, bill to impeach, supported by evidence as to merits, throwing light on conduct of arbitrators, 235 *a.*
properties and conclusiveness of, 426 *a*, and *b.*
under an Act of Parliament, 426 *c*, and *d.*
effect of, 426.
BACON'S ESSAY OF JUDICATURE, reader referred to, 500 *a.*
BAIL, how made competent, 371.
BAILIFF, since deceased, entries in books, &c., by, 310 *b.*
proof of authority, &c., to let in entries, &c., 313 *a.*
BALANCE SHEET; see *Bankrupt, admissions by.*
BANK OF ENGLAND,
a public body, consequences as to bank bill, &c. 166 *c.*
books of, what entries in, proveable by copies, 166.

BANK OF ENGLAND—*continued.*
books of, when to be produced, 166 *b.*
inspection of, 172 *b.*
signature and proof of, 264 *c.*
Cashier of, attendance of, dispensed with, 255.
BANK NOTE, presumption as to amount of, 478 *b.*
in prosecution for forgery of, attendance of Cashier dispensed with, 264 *c.*
see *Cheques, Joint Stock Bank.*
BANKER, pass book between him and customer, not evidence of a settled account, 310 *b.*
cheques on, of what *primâ facie* evidence, 390 *a.*
custom of, taken notice of, 396 *b.*
BANKRUPT,
assignee of, as to competency of, 358.
assignees of, bound by his admissions, 464 *b.*
incompetency of, 353-4.
for want of his certificate may be incompetent, 373.
of what may be witness, 376 *a.*
since stat. 6 & 7 Vict. c. 85, 354 *a.*
admissions by, of debt, 462 *a.*
balance sheet and examination of, evidence by, 310 *a.*
declarations by, at the time of an act of bankruptcy, 304 *c.*
entries in account books, &c. by, written or signed by him previously to the act of bankruptcy, available for assignees, 310 *a.*
examination of, against whom not available, 259 *e.*
wife of, how far examinable, 343-4 *a.*
having availed himself of, estopped from disputing, the commission, 461-2 *a.*
see *Certificate, Fiat.*
Gazette (by statute) made, in certain cases, evidence as to, 400 *k.*
the Lord Chancellor's Secretary of, documents in his custody, office copies of, 157.
and Creditors of such, incompetency of, cases, 354, *ib. c.*
BANKRUPTCY,
affidavits in, costs of, 544 *c.*
depositions in, made admissible in by act of Parliament, 263 *e.*
examinations in, remedy when improperly made, 263 *d.*
of a husband, wife cannot be examined to prove, 344 *a.*
cross-examination in, 61 *d.*
incompetency of a creditor, as a witness, not to be objected by himself, 80 *e*, 87 *i.*
adjudication of Commissioners in, 436.
petition in, on hearing, in general, all affidavits filed entered as read, 533 *c.*
proceedings in, the originals used at law, 153 *a.*
proceedings in, 436 *et seq.*
appeal in, from Court of Review to the Chancellor, upon matter of Law, or Equity, or the refusal or admission of Evidence, 437 *a.*
Court of Review in, seal of, 413 *e.*
in England, proof of at Calcutta, 154 *c.*
BANKRUPTCY COURT,
two modes of examination (oral and written) combined, 497.
will, in general, rehear Petitions and rescind Orders, upon fresh evidence tendered, &c., 537 *c.*.
issue directed by, as to examination of parties on, 525, *f.*
BAPTISMS, 167 *f*; see *Parish Registers.*
register of, in the Ecclesiastical Court, proof of acknowledgment of the child, 317 *b.*
certificate of, by Romish priest, not evidence, 167 *f*, 307 *e.*
see *Bible, entries in, Circumcision.*
BARBADOES, proof of a marriage at, 167 *f.*
BARGAIN AND SALE,
effect of enrolment of, 417-18.
non-presumption of enrolment of, 481.
BARON AND FEME; see *Husband and Wife.*
BARONAGE, Dugdale's, not evidence, 398 *f.*
BARRISTER; see *Counsel.*
BASTARD, proof of filiation of, 5 *b.*
BASTARD EIGNE, declaration as to birth of, made by the parents, 323 *b.*
BASTARDIZE, issue, after marriage, testimony of parents to, not permitted, 384.
BASTARDY, to be certified, proclamations necessary, 440 *c.*
BELIEF of Witness, not his thinking, is evidence of handwriting, 265 *a.*
of what (of an answer or affidavit) makes against his part who swears, without believing what makes for it, 467 *e.*
BENCOOLEN, examination of witnesses at, 116 *i.*
BENEFIT SOCIETY, rules of, copy of, 159 *f.*
BEQUESTS, to persons attesting a will, since 1837, void, 183.
BEST Evidence must be produced, as a general rule, 247; see *Secondary.*
Witness must be examined, as a general rule, 248.
BIBLE, Family, entries in fly-leaf of, as to matters of pedigree, 317 *f.*
entries in, common evidence of pedigree, in this country and in America, 319 *d.*
entry in, evidence of matter of pedigree, and why, 319 *d.*
test of, when printed, &c., 319 *e.*
BIGAMY; see *Marriage.*
BILL,
of Attorney, subscribed as having been received, used as secondary evidence of the execution of deeds, 309 *g.*.
Bank; see *Bank of England.*
of Costs; see *Solicitor's Book.*

BILL—*continued.*
of Cravings of a Sheriff, record of, 165 *f.*
and Cross-bill; see *Cause, costs of, Cross-cause.*
for Discovery converted into one for relief, defendant allowed to put in new answer, 18.
filed by defendant, to a bill for relief, costs of, order as to, 195 *e*; see *Discovery, Plaintiff.*
allegations necessary in, to sustain motion for production of documents, 27.
seeking relief on the ground of loss, destruction, or detention of a document, affidavit of plaintiff to be annexed to, 276 *d.*
affidavit required to accompany, 538 *e.*
suggestion in, of loss or want of instrument, affidavits to support jurisdiction, 539 *b.*
to have the benefit of a former decree, proofs available in support of, 537 *e.*
of Exception for an alleged misdirection of the Judge who tried an Issue, will not lie, 529 *a.*
of Exchange, noting and protest of by a Notary public, 254 *d.*
of Exchange, patent ambiguity in, 279 *b.*
and other negotiable securities, restriction of testimony to invalidate, 385 *c* and *d.*
presentment of, evidence of, 309 *g*; see *Acceptance Declaration by Acceptor, deceased, Notary, Clerk of.*
of Interpleader, affidavit with, as to form and conclusiveness of, 538 *b.*
of Lading, 187 *i*; see *Stamp.*
impossible to put in, all the questions that may be material, the Answer frequently suggests something, 518 *d.*
must have been filed to examine witness *de bene esse*, 122.
to examine *de bene esse*, when demurrable, 124 *d.*
to examine witness as *de bene esse*, affidavits required, 539 *a.*
to perpetuate testimony, "as to honour, title, dignity, office, estate or interest, in any property," 134.
to perpetuate testimony, necessity and form of such, 129, *et seq.*
proceedings on, 131.
and Answers, at Rolls, destroyed by fire, 1618, 269 *c.*
in Chancery since the 17th of Richard 2, found in the Tower, 151.
in Chancery, use of as evidence in the Court of Chancery, 427 *e.*
in Chancery, in general not evidence in a Court of law, to prove any facts alleged or denied in it, 427 *c.*
being read, Answer to be read, 427 *f.*
statements in, 9, 16.
frame and use of, 10 *a.*

BILL—*continued.*
infant being plaintiff, 10.
statements in, difficulty as to untruth of, 16, 16 *e*, 17.
statements in, precluding evidence by the defendant to prove the fact, or by the plaintiff to the contrary, 237.
statements in, not admitted by the Answer, what to be proved, 238.
office copies of, 151 *c.*
office copy of one not on the file, 158 *b.*
office copy of, when original record not to be found, 165 *a.*
proof of, to render answer available, 164 *c.*
proof of, to let in answer, &c., 426 *g.*
what evidence of, 426 *f.*
lost, use of answer, 161 *c.*
effect of, 427 *a, b, c* and *d.*
use of, 427 *e.*
not to be recited in decrees or orders, except Orders for Special Injunction, 162 *f.*
of Review, permission to file, to supply defects or omissions of proof, 196 *c.*
where leave to re-examine witness refused, 202 *c.*
demurrer to, effect of, 534 *b.*
see *Demurrer to.*
for specific performance of an agreement; see *Agreement, Allegations in, Misstatements in, Suggestions in, Statements in, Amend a Bill, Cross Bill, answer to, Dismissal of.*
order to retain, with liberty to bring an action, suit to be dismissed if action not brought, 524.
see *Pro Confesso, Supplemental Bill.*
BILL AND ANSWER,
hearing on, 11 *e.*
hearing on, effect to admit statements in Answer, 22.
hearing on, Lord Clarendon's Order, 22 *a.*
hearing on, 23rd Order as to, 239 *c.*
cause heard on, effect; see *Examination of a Party.*
BIRTH, the place of, not matter of pedigree, so as to admit declarations as to, 320 *c.*
proof of; see *Bibles, entries in, Parish and other Registers.*
BISHOP, a Lord of Parliament, though not a Peer, 65-6 *f.*
case laid by, before counsel, admissible against his successor, 312 *b*; see *Corporation, Ecclesiastical.*
BISHOPS' COURTS, copies of parish registers in, 167 *f.*
BISHOP'S REGISTER, entry in, as to institution or collation, blank supplied by parol evidence, 276 *e.*
copies of parish registers deposited in, 167 *f*; see *Archbishop, Ordinary.*
use of, when originals lost, 268 *c.*
BISHOPS' REGISTRY, 167 *d.*
BLANK, in an instrument, 277 *b.*
in a will, not to be filled up by parol evidence, 279 *e.*

BLANK—*continued.*
columns in an examination, abuse as to, 245; see *Prolixity.*
BLEMISH, in an ancient deed, effect of, 185 *e.*
BLIND PERSON, deed executed by, 331 *c.*
Attesting Witness being, no excuse for not examining him, 174 *h*, 331 *c.*
witness being, 251 *b.*
BOARD, notice on, copy of, admission of, without notice to produce original, 273 *d.*
BONA FIDE conduct of party, supported by the Court, 224 *a* and *b.*
BONA NOTABILIA, elsewhere, proof of, to shew Court, which has granted probate, &c., had no jurisdiction, 444 *e.*
BOND, cancelled, use of in evidence, 271 *c.*
from client to attorney, strictness as to proof of, in Court of Exchequer, 6 *a.*
executed in India, proof of, 265 *a.*
destroyed, secondary evidence of, use of in the Courts of India, 268 *c.*
lost, no evidence of, at law, because *profert* to be made, 268 *c.*
alleged to have been obtained by fraud and imposition, all parties were ordered to be examined, 506 *b.*
presumption as to payment of, repelled by evidence of impossibility, 474 *f.*
is *primâ facie* evidence, 176 *c.*
for performance of articles, use of, as secondary evidence, 271 *c.*
proof of, being in substitution, 389 *b.*
proof of, being indemnity, 390 *a.*
BOOK OF ACCOUNTS, when and why not proveable at hearing, as an exhibit, 189 *h.*
BOOKS, ancient, 453.
of collector of tithes, 312 *e.*
of company or society, possession of; see *Secretary, Entries in, by Persons Deceased, Parish Books, Solicitor, books of.*
of a testator, see *Testator.*
see *Abbey, Attorney, books of, Bank of England, Bishops', Corporation, Parsons', Rectors', Registers, Manors', Monastic, Universities and Vicars'.*
any religious, entries in, 319 *f*; see *Bibles.*
see *Charge, Collector, entries by, Discharge, Documents, Exhibits, Family Bibles, Prayer Books.*
lost, consequent direction in an order to take accounts before the Master, 514 *b.*
see *Merchant's Letter-Book, Minute Book of Registrar, Partnership Accounts.*
shop, not evidence, 314.
see *Solicitors, Steward.*
BOOKKEEPER, see *Agent, Clerk.*
BOUNDARIES, evidence as to, 306 *g.*
county history not evidence of, *ib.*; see *Maps, Manors, Parishes.*
BRIDGE, see *Presentment.*
liability to repair, see *Inhabitants, Statements by.*
BRIEF, notes upon the back of, 458 *d.*
BRITISH CONSUL, empowered to act as a notary, 254 *f.*
Vice Consul, certificate of, 255 *a.*
BROTHER AND SISTER, see *Relative.*
BUILDING, see *Technical Terms.*
BURDEN OF PROOF, see *Report of Master.*
BURIAL CERTIFICATE, with proof of identity, to prove a death, 249-50 *a.*
mere affidavits as to, 250 *b.*
BURIALS, 167 *f*; see *Parish Registers.*
BUSINESS, of the Court of Equity, pressure of, formerly, an excuse for sending Cases to a Court of Law, 530 *d.*
in course of; see *Book-shop, Entries in Books, &c., Trade.*

CALCUTTA, proof at, of bankruptcy here, 154 *c.*
CANAL ACTS, 408.
CANCELLATION, of improper examinations in bankruptcy, 263 *d*; see *Suppression.*
CANCELLED BOND, use of, in evidence, 271 *c.*
CANON LAW, how witnesses examined, 52 *e.*
CANON AND CIVIL LAW, rule of, as to secret examination of witnesses, 74 *c.*
CANTERBURY, see *Archbishop of, Ordinary.*
CAPITAL LETTERS, use of, a test as to the genuineness of handwriting, 266 *c.*
CARRIAGE of a Commission, party having, makes default, New Pr., 97 *d.*
of Depositions or Examinations, of witnesses, &c. 110.
oaths as to, 110 *b.*
CASE,
for the opinion of counsel, rejected in a peerage case, 319 *c.*
sent to a Court of Law, by a Judge in Equity, when he entertains a doubt, 530 *c.*
drawn up by the Master, or the Court, without a reference, 530.
signature of counsel to, consequence of want of, 530 *j.*
new one, when directed, 532.
see *Equitable Interests.*
CASES, weight due to, 402-3.
CASES REPORTED; see *Precedents, Reporters.*
CASES AND OPINIONS; see *Production of Documents.*
CATHOLIC, ROMAN; see *Papist.*
CAUSE,
name of, mentioned in an affidavit, 539 *d.*
affidavit in one, not to be used in another, 540 *e.*
a Motion to advance, notice of affidavit on, 545 *d.*
set down for hearing, not requisite as to suit to perpetuate testimony, 133-4 *a.*

CAUSE—*continued.*
standing over, to admit of the proof of a document, 189 *i.*
a translation to be correct, *ib.*
called on to prove exhibits by the *vivâ voce* testimony of witness in Court, 493 *b.*
depositions in another, order to use obtained, use without order, by adverse party, Order as to, 195*f.*
pending, proof of, to let in use of depositions in another, 259.
answer in the, part thereof readable, but of an answer in another cause the whole is admissible, if part is read, 468 *c.*
stands over for re-examination, after suppression of depositions for irregularity, 219 *e.*
hearing of, proof of exhibits, 188, *et seq.*, calling on, mode of proof of exhibits, 188 *g*; see *Cross-Cause, Depositions in.*
depositions in; see *Publication.*
CEREMONIES used in administering the oath, affording a hint as to the credit due to the witness, 471 *b.*
CERTIFICATE,
receivable in evidence by any Act of Parliament, 157-8.
certain, made evidence by Acts of Parliament, 205 *b.*
general rule, no such allowed, 254 *g*, but see above.
under the King's Sign Manual, 254 *g.*
of public officers; see *Marshal of the Host, Recorder, Secretary at War.*
of public officers; see *Judge, Ordinary, Sheriff, Justices, Notary, Public.*
Judges signature to, judicial notice of, 413 *h.*
by Courts of competent jurisdiction, conclusive, 438 *e.*
of a bankrupt, petition to stay rehearing of, not on new evidence, 537 *c.*
of bastardy, 440 *c.*
of Commissioners, 108.
by Commissioner of default of a witness after summons, 101.
of refusal of witness to be examined, 251.
of Master for a Commission, 502.
of necessity for commission to examine witnesses abroad, 117 *h.*
that a commission is necessary and so of one to examine abroad, 509 *c.*
as to interrogatories settled; see *Interrogatories.*
of the sufficiency of an examination, 521.
of necessity of commission to falsify an examination before him, 520 *b.*
of Master; see *Report to Falsify.*
of Ordinary as to marriage conclusive, 440 *c.*
CERTIFIED COPIES, made evidence, by certain Acts of Parliament, 155.
CERTIFIED COPY, receivable in evidence by any Act of Parliament, 157-8.
CERTIORARI, writ of, use of, to demand the Records of other Courts or tenor of them, 411-12.
CESTUI QUE TRUST, declaration of, admissible against trustees, 464 *a.*
CESTUIS QUE VIES when presumed to be dead (by the act), 482-3 *a.*
CHAMBERS; see *Judges at.*
CHANCELLOR, to declare himself unable to expound the law is unsatisfactory, 530.
assisted by two of the Common Law Judges, 530 *c.*
CHANCERY,
where one witness only contradicting an answer, 5 *b.*
relaxation of rules of evidence in compassion, 6 *a.*
issues sent from, (were) usually directed to the Court of Q. B. or C. P., 524 *c.*
Commissioners did not recommend change in the practice, as to evidence, 75 *c.*
Commissioners' Report of propositions in, as to appeals, evidence on, and decrees, form of, 535-6.
proceedings when assumed a more regular form, 151 *b.*
Court of, proceedings in, memorials of, 150.
memorials of proceedings in; see *Answers, Bills, Records, Replications, Proceedings.*
of Ireland, examination of witnesses *vivâ voce*, 53-4 *d.*
of Ireland; see *Publication, Examination after.*
of Ireland, cross-examination in, 61 *d.*
of Ireland, proof of ancient deed in, 189 *i.*
proof of exhibits in, 191 *b.*
no cross-examination at the hearing, *ib.*
in Ireland, production of the Records of, in trial of a civil action, 150*f*; see *Bill in.*
CHAPEL; see *Minister of.*
CHAPTER-HOUSE OF WESTMINSTER ABBEY (or Receipt of the Exchequer) Records in, 166.
CHARACTER, in general, whether put on issue, 234 *a.*
evidence as to good, irrevelant, *ib. c.*
as to bad, scandalous, *ib. e*; see *Drunkenness, Lewdness.*
evidence as to, in prosecutions, criminal, but not in suits, civil, 234 *c*; see *Official Character.*
CHARGE, paper read as, readable by the other party as discharge, 467 *a*, 468.
CHARITABLE PURPOSES, secret trust for, admitted by devisees, parol evidence admissible to prove, 293-4.
CHARGE AND DISCHARGE of a party in his examination, 515 *e.*
CHARITABLE USES; see *Statute of.*
CHARITY ENDOWMENT DEED, use of parol evidence to construe, 282 *a.*

CHARTERS, assistance in construing, 281 *d*; see *Crown*.
CHARTULARY OF AN ABBEY, 169 *c*.
CHEQUES, proof of signature to, 265 *c*.
post dated, 288 *g*.
of what, *primâ facie* evidence, 390 *a*.
CHESTER, Seal of Court of County Palatine of, 413 *c*.
CHIEF, examination in; see *Examination*.
CHILD,
witness being such, as to competency and oath, 65-6-7 *f*.
however young, who understands the nature of an oath, competent, 331 *f*.
See *Advance Portion*, *Portion*.
CHILDREN AND PARENTS; see *Relative*.
CHINESE WITNESS, such, how sworn, 65-6 *f*.
CHRISTIAN, witness being, credit due to, 471 *a*.
Courts; see *Courts Ecclesiastical*.
CHRISTENINGS, 167 *f*; see *Parish Registers*.
CHRONICLE, Speed's referred to, to fix dates, &c., 397.
CHRONICLES, referred to, as to style of a King, 398 *e*.
CHURCHWARDEN, presumption as to a person being, 478 *f*.
CHURCHWARDENS, parish lands vested in, 479 *b*.
CIRCUMCISION by a Jewish Rabbi, register of, not evidence, 307 *e*.
certificate of, not admissible, 167 *f*.
CIRCUMSTANCES, question whether, outweigh rule as to single testimony against answer, 227-8; see *Corroborative*, *Single*, *Testimony*, *Trial*, *Witness*.
collateral, explained by single witness, 227 *b*.
aiding single testimony, 523 *h*.
not essential to a transaction, not to be proved, 241; see *Special Circumstances*.
CIRCUMSTANTIAL EVIDENCE, in general, and its use, 472 *a*.
accumulation of minor points of, not amounting to conclusive evidence, 487 *b*.
CITIZENSHIP, proof of, 253; see *London*.
CIVIL ACTION, witness liable to, not bound to answer, 83-4 *a*.
in Ireland, use of office copy of Record of the Court of Chancery there, 150 *f*.
CIVIL AND CANON LAW COURTS, how witnesses examined in such, 52 *e*.
CIVILIANS, cases sent for the opinions of, as to the rules by which the Ecclesiastical Courts are guided in the reception of evidence, 295 *c*.
CIVIL LAW, how witnesses examined, 52 *e*.
Courts, the mode of attacking the credit of a witness in, 330 *c*.
incompetency in, on ground of relationship or affinity, 345 *e*.
CIVIL PROCEEDING, at law, use of office copies of Proceedings in Equity in, 153.
CIVIL RIGHTS, being affected, yet witness must answer, 84 *e*.
CLAIM, affidavit of party in support of his own, 338 *e*; see *Release*, *Right*.
CLAIMANT, examination of, on a reference, 506 *b*.
affidavit of, not to be relied on, its use explained, of no avail where the claim is contested, 512 *f*.
Master at liberty to examine, and how, 519-20; see *Pro interesse suo*.
CLANDESTINE; see *Marriage*, *clandestine*.
CLASS OF PERSONS, inquiry as to, 490 *a*.
CLERGY, books of, entries in, as to tithes, evidence for their successors, 312.
communications to, not privileged, 381 *c*.
CLERICAL; see *Clergy*.
CLERK; see *Agent*, *Examiners and their Clerks*, 68 *a* and *b*.
deceased, entries in books, &c. by, 310 *b*.
proof of authority, &c., to let in entries by, 313 *a*.
entry by, in letter book of merchant, 314 *f*.
of Affidavits, power of, to administer certain oaths, &c. 541 *c*.
of Assizes, 159.
of Attorney, &c. 380 *g*; see *Advocate*, *Attorney*, *Conveyancer*, *Counsel*, *Proctor*, *Scrivener*, *and Solicitor*.
to Commissioner, to take oath, &c. 99-100.
being a witness, when and how to be examined, 107 *b*.
who have been sworn, engross depositions on parchment, 110 *b*.
in Court, agreement by, 47 *b*.
attendance of, at the hearing, with the Record, 151 *d*.
see *Clerk of Records and Writs*.
duties transferred to, 151 *d*.
his duties assigned to solicitor, 188 *d*.
of Enrolment in Chancery, power to administer certain oaths, 110 *f*.
of Enrolments, power of, to administer certain oaths, &c. 541 *e*.
of Master, his duty, order as to, 509 *b*.
question as to the appointment of, 530 *c*.
Record and Writs, duties, power to administer certain oaths, 110 *f*.
to attend with records, &c., 151 *d*.
power of, to administer certain oaths, &c. 541 *e*.
of Solicitor to a party not to act as clerk to a Commissioner, 220 *f*.
of Steward, entries by, 248 *a*; see *Steward*.
of Treasury, 159; see *Entries, in books of, by deceased*.
CLIENT; see *Attorney*.
bond from, to attorney, 6 *a*.

CLIENT—*continued.*
secrets of, professional adviser strongly reproached for disclosing, 379 *d.*
and Solicitor, accounts between, 512 *f.*
COAL MINES; see *Mining.*
COALS, right of the lord (of the manor) to dig for, evidence of reputation as to, 306 *b.*
sold, entries as to, 310 *b.*
CO-DEFENDANT; see *Party, examination of.*
CODICIL, being distinct from the Will, probate evidence of, 444 *a.*
CO-EXECUTOR, where not examinable as witness by an Executor, 515 *h.*
COGNIZANCE; see *Judicial Cognizance.*
modified; see *Judicial.*
COHABITATION, certificate as to, of town and minister of Utrecht, 439 *d.*
COHEIRS; see *Heir-at-Law.*
COKE, his books quoted, as to history, 399 *d.*
COKE UPON LITTLETON, almost a Digest of the Year Books, 404 *a.*
COLLATERAL CIRCUMSTANCE, explained by single witness, 227 *b.*
COLLATERAL INQUIRY,
not affecting the issue, or testing the credit of the witness, interrogatory raising, 232 *e.*
COLLATION, of seals and signatures, 266 *g.*
COLLECTOR, examination to prove that writer of an entry in a book, &c., was, 189 *h.*
deceased, declarations by, 310 *b.*
proof of authority, &c. to let in entries by, 313 *a.*
entries by, admissible against his sureties, 464 *c.*
COLLEGES, entries in books of, as to admissions, 304 *d.*
who Founder of, not proveable by history, 398 *f.*
sentence of Visitor of, against a Member, 435.
COLLISION; see *Admiralty Court, Precise Words.*
in case of, presumptions by the Court of Admiralty, 478 *b.*
COLLUSION, between a party and a witness who cannot be found, 252 *e.*
COLONIES, &c., under the Crown, &c. witnesses in, 125-6.
Courts in, exemplifications from, 154-5.
and Islands, marriage in, 167 *f*; see *Barbadoes.*
COLONY; see *Magistrate of.*
COMMISSION,
to take a defendant's examination, on Motion for, time left to the Master, 518 *a.*
new trial and order for, laches in proceeding on, effect of, 529 *a.*
application for, 536 *h*; see *New Evidence on Rehearing.*
COMMISSION—*continued.*
to enable persons to act on Master's extra, in Scotland and Ireland, 542-3.
in the Army, appointment to, not proveable by the Gazette, 400 *l.*
and Proceedings in Bankruptcy, 437; see *Bankruptcy, proceedings in, Certificate of Master.*
to bill for discovery and, defendant cross-examines only, 70 *b.*
to falsify an examination; see *Certificate.*
COMMISSION TO EXAMINE WITNESSES,
not being used, but they examined by the Examiner, 77 *a.*
when necessary, 88.
old practice as to (prior to May, 1845), 89.
how obtained, 89.
carriage of, 89-90.
additional ones, 89, 90.
joining in commission, 90, 91.
naming Commissioners, 91.
form of, 91-2.
oaths, &c., 92.
advantage of carriage of, 93.
occasion for new one, *ib.*
notice of execution of, 93.
execution of, *ib.*
summons to witnesses, form of, 93-4.
new practice (since the orders of May, 1845); see *Commissioner, Defendant, Issue, Replication.*
carriage of, by plaintiff, 94 *b.*
by defendant, 94-5 *a.*
returnable without delay, 95.
Commissioners, two only, 95 *b.*
who eligible, *ib.*
one only to act, *ib.*
making out, when parties agree, 95 *c.*
by Clerk of Records and Writs, *ib.*
time for parties to agree, *ib.*
procedure when all do not agree, *ib.*
time for the parties to agree as to nomination of Commissioners, 95 *e.*
to be barristers or solicitors not concerned in the cause, 95 *b.*
their powers, *ib.*
procedure when parties disagree, 96 *b.*
Masters' jurisdiction and duties, as to, *ib.*
form of, 97.
additional one required, 96-7.
making out, 97.
new or additional, *ib.*
having the carriage where party makes fault, *ib.*
procedure when additional one required, 96-7.
making out when the Master nominates Commissioners, 97 *b.*
form of since 28th of October, 1845, under the orders of May, 1845, 97-8.
notice to be given of the time and place of examination, 100-1 *a.*

COMMISSION TO EXAMINE WITNESSES—*continued*.
old practice, opening and reading, &c., 102-3.
proceedings under, 102, *et seq.*
mode of examination under, 104-5.
special one issued, to re-examine a witness, but superseded, 105 *d*.
new interrogatories to be exhibited, leave must be first obtained, 106 *f*.
new practice, proceedings under, *de die in diem*, 109 *c*.
new practice, adjournments, 109.
entry on depositions, *ib*.
execution of, endorsements as to, 110.
return of, 110.
directed by a Court of law; see *Court of Law*, and 118 *a* and *f*.
to be executed in Scotland or Ireland, 126-7*.
new, new practice as to, 128.
additional, *ib*.
abroad (at law), 126 *a*; see *Interrogatories, Examination upon at Law*.
new or additional, 127.
renewed, Lord Clarendon's Order as to, 127.
abatement of suit, 127 *a*.
Master armed with, 501 *d*.
to examine *in perpetuam rei memoriam*, old order as to clauses in such, 132.
for examination of witnesses *de bene esse*, not opened nor depositions published, 153 *b*.
abroad, to discredit witness not allowed to cause delay, 208.
abroad; see *Abroad, Discovery, Injunction*.
execution of, notice of, necessity of, 220 *a*.
on Master's certificate, 502 *e*.
for examination of witness as to falsify an examination of a party before the Master, 509 *c*; see *Certificate*.
necessity of, certified by Master, granted on motion of course, 509 *d*.
granted on a Master's certificate, order for motion to discharge, 509 *a*.
COMMISSIONERS,
to examine witnesses out of town, or witnesses residing more than twenty miles from town, who will not come up, 62.
taking down scandal, 76 *d*.
warrant to name, 95 *d*.
new practice, when nominated by Master, 97 *b*
oath to be taken by, 99.
acting, authorised and required to administer oath to clerk or clerks, 100 *b*.
must not act as solicitors, for a party who has to examine witnesses under it, 101 *a*.
interrogatories exhibited before, practice "to feed" with, 102 *f*.
full power to examine and cross-examine, for all parties, 103 *d*.
one appointed, but not qualified, not to be present at the examination, 104 *a*.
how far agents for party, 105 *a*.
action for fees, 105 *a*.
restrained, &c. *ib*.
COMMISSIONERS—*continued*.
computation of their remuneration, 106-7.
fees payable to, 109.
payment to, 111-12, *a*.
to proceed *de die in diem*, 109.
six hours a day, between 8 a.m. & 6 p.m. *ib*.
making a false return, 109 *b*.
may adjourn proceedings, 109 *c*.
must make entry on depositions, *ib*.
sign indorsement, showing execution of the commission, 110.
subscribe their names to each skin of the engrossment of the depositions, 110 *d*.
errors of, cases of, defects supplied, 197-8-9.
examining witness in London, irregular and bad, 219 *g*.
not to employ clerk of solicitor of a party as his clerk, 220 *b*.
not to be agent, attorney, solicitor, nephew, relative, or clerk to the party, 220 *e*.
not examinable, after the examination of the witnesses has commenced, 375.
being a witness, when and how examined, 107 *b*.
OF BANKRUPTS, effect of adjudication by, 436.
OF THE COURT OF EXCHEQUER IN IRELAND, recognised by the Court here, 541 *g*.
OF THE GREAT SEAL, subpœna to testify before, 53 *d*.
alluded to in form of *subpœna*, 493 *b*; see *Partition*.
COMMISSIONS,
necessity of proving, to make return admissible, 160 *d*.
in temp. Hen. 8, as to value of Livings, 160 *e*.
wanting, 166 *a*.
COMMITTAL, motion for, affidavit on, 545 *d*.
COMMON, right to till, evidence of reputation as to, 306 *e*.
right to, and evidence of reputation as to, 306 *d*.
COMMON FORMS of Interrogatories for examining to accounts, 515.
other cases; see Appendix.
COMMON LAW AND EQUITY,
differences in the practice, as to the examination of witnesses, 62.
COMMON LAW TRIBUNAL,
proceedings before the Master, showing a necessity to refer matter to, 522 *e*.
COMMON LAW, matters cognizable at, 1.
Courts of, when adopt rules of Courts of Equity, 7.
mistakes of, as to practice in Equity, 7.
examination of witnesses in, to discredit others, 204.
decisions of, as to evidence, in general, binding in Equity, 3, 4; therefore reference to Common Law Reports, &c., necessary, 4 *a*.
when aid of, sought by Court of Equity, 523; see *Issue*.

COMMON REPORT, parol evidence of, to prove who was patron of a living, 276 *e*.
COMMONERS, competency of, case of, 36 *h*.
COMMUNICATIONS, between East India Company and Board of Control, privileged, 377 *d*.
confidential, but yet not privileged, instances of, 381.
with professional men, but yet not privileged, 383.
obtained professionally, although through a third person, accompanying the client, privileged, 384 *d*.
gleaned in collecting evidence for the trial or hearing, privileged, 384.
however privileged, overheard by a third person, must be disclosed by him, 384 *f*.
counsel, 211 *a*.
with a witness, 220 *h*.
what proper, what improper, 221 *i*.
between two witnesses, 222 *e*.
CO-PARTNER, as to the incompetency of, 359 ; see *Partner*.
COMPANY, document or proceeding of, receivable in evidence, by any Act of Parliament, 157-8.
books of, possession of, 273 *d*.
secondary evidence of, *ib*.
civic, entries in, as to admissions to the freedom, 304 *d*.
See *Bank of England, East India Company*.
COMPARISON ; see *Collation of Seals and Signatures*.
of handwriting, use of, 266.
COMPASSION of the Court, for an accounting party, under peculiar circumstances, 6 *a*.
COMPETENCY
of a witness, distinct from credit due to him, 206 *c*.
affected by the fact that the decree, judgment, or verdict, may be given in evidence in another suit, &c., 359 *e*.
(prior to the late Act) test of,
and objections to the test, 363-4.
proper time for examination to, before publication; but as to credit, after publication, 330 *d*.
motion for leave to examine as to, 330 *e*.
restoration of, 334 *c*.
means of restoration of, 368, *et seq.*; see *Testator*.
COMPETENT WITNESS,
to a will, since 1837.
devisee, legatee, but gifts to them void, 183.
creditor, executor, 184.
See *Witness*.
COMPOSITION, real, evidence of, not admissible to support plea of a modus, 232 *c*.
extending over township, proof of, 236 *d*.
COMPOTUS
of a *Propositus* or reeve, 165 *g*.
entries in, 310 *b*.
COMPROMISE, admissions made with a view to, 459 *c*.
offer of, cannot be taken advantage of as an admission, 465-6.
CONCEALED PERSONS, deaths presumed, by the several Acts, 482-3.
CONCERNED in the cause ; see *Counsel, Master Extraordinary, Solicitor*.
CONCLUDE, effect to, of an examination before the Master unreplied to, 520.
CONCLUDED, offer, by plaintiff, to be, by the answer of the defendant, 506 *b*.
See *Perjury*.
CONCLUSIONS of Law, evidence of admissions of, must be put in issue, 230 *a*.
and opinions ; see *Medical Evidence*.
CONCLUSIVE EVIDENCE distinguished from *primâ facie*, 246 *a* ; see *Primâ facie* evidence.
CONCUBINAGE, agreement to live in, inquiry as to, in a bill, 85 *c*.
CONDUCT of parties to an agreement in writing, parol evidence to show, 282 *b*.
raising presumption, 478 *f*.
of arbitrators ; see *Award, Husband, Misconduct, Wife, Disgraceful*.
CONDUCT MONEY, of Witnesses, 101 *e*, examined in Scotland or Ireland, 127*.
CONFESSION in cases of fraud, 474 *e*.
of a party, to be taken wholly, 467 *b* ; see *Charge and Discharge*.
to priests, not privileged, 381 *c*.
by a wife, 344-5.
See *Confidence, Declarations by Dying Persons, Trust*.
CONFIDENCE of parties in certain admissions, rendering them binding, 460.
in professional advisers, 378 *f*.
attempt to infringe, reprehended, 379 *d*.
reposed in a devisee, by a testator, 292; see *Trusts imperfectly expressed*.
or trust between parties, admissions in Answer of one, evidence against the other, 430 *c*.
CONFIDENTIAL COMMUNICATIONS not privileged as such, nor by waiver of a prosecutor, 49-50.
CONFRONTING ; see *Contradicting Statements, Witness*.
CONFUCIUS, disciple of; see *Chinese Witness*.
CONSANGUINITY, evidence of, reputation of, 307-8 ; see *Pedigree, Relation*.
CONSCIENCE of the Judge, who has directed the issue, satisfaction of, 528-529 *a*.
of a witness, as to oath to be taken, how far may be accommodated, 65-6 *f* ; see *Court of Conscience*.
CONSENT will not remove the objection of want of a proper stamp to a document, 49 *c*.
of parties to empower Judge in Equity to examine witnesses *vivâ voce*, 499.

CONSENT—*continued.*
of parties necessary to the use of affidavits, as evidence, before the Master, 511 *e*.
decree by, yet evidence entered, 533; see *Admissions, Waivers.*
will not warrant the examination of a witness, in a criminal case, on interrogatories, 49 *d*.
CONSEQUENCES of the evidence, as affecting the competency of the witness, 363.
CONSIDERATION MONEY, cross-examination of a witness, to show it had not passed, 386 *a*.
receipt for, *on* a deed, parol evidence to explain or vary, *in* a deed *secus*, 276 *e*.
expressed in a deed, parol evidence to vary, or add to, 287: see *Acceptance.*
CONSISTENT TESTIMONY of witness, on former occasions, 209 *c*.
CONSISTORY COURT, proofs of, appeal from, to Court of Arches, 161 *c*.
CONSPIRACY in action for, use of the answer of defendant in a suit in equity, 428 *f*.
witness not bound to admit, 83 *e*.
CONSTAT, order as to the examination of, 411 *b*.
of letters patent, 415.
CONSTRUCTION, doubts on a question of, 530 *c*.
of instruments in writing: see *Ambiguities, Difficulties, Will, Written Instrument.*
CONSUL; see *British Consul.*
CONSULS; see *Notary Public.*
CONTEMPT,
alleged, evidence by affidavits as to, 545 *d*.
proved, by a single witness, 5 *b*.
in emergencies arising from, use of *vivâ voce* examination, 493-4.
of a defendant, proof of, by testimony of the plaintiff, 339 *b*.
of a party, no hinderance to the objection of scandal, on his part, 218-19 *a*.
no process will lie for, upon disobedience of the summons of commissioner, 101 *c*; see *Commissioner, False Return, Fine, Misbehaviour, Witness.*
CONTEXT of an entry in a book to be read, 309 *a*.
CONTRACTS, presumptions as to, from the nature of the subject, and from local usage, 479 *b*.
CONTRADICT a witness, at law, another witness called to; but notice being given to the first, on his cross-examination, 204 *d*.
CONTRADICTORY, the evidence being, issue directed, (as a test of the credit due to the witnesses respectively), 523 *b*.
statements by a witness, on depositions in another cause, 208 *f*.
statements by a witness; see *Statements, Witness.*
CONTRAVENTION of Marriage Act, witness not bound to admit, 84 *e*.
CONTRIBUTION, liability to make, as affecting competency, 360 *b*, 361-2 *a*.
CONTROL over suitors in equity, to compel them to waive objections, 263 *b*.
of a party, over documents, 274 *c*; see *Custody and Power, Party, Possession.*
CONVERSATION between client and adviser, overheard, not protected, 384 *f*.
evidence of, not admissible, unless the attention of the other party has been called to them by the adverse pleadings, 229 *a*; see *Declarations of Persons, Parties on the Record at Law*, 313 *d*.
use of a portion of, gives credit to the whole, 466 *c*.
mere idle, of but little weight, 463 *c*.
See *Admissions, Communications, Declarations, Entries, Notice, allegation of. Statements.*
CONVERSION amounting to a felony, witness not bound to admit, 83 *f*.
CONVEYANCE, presumed, 481-2.
of commission to examine, in the country, 110-11.
abroad, 120.
CONVEYANCER, mistakes by, rectified, 289; but instructions to be produced, *ib.*
rely and act upon certain admissions and statements, 460.
restricted in their testimony, 378; see *Counsel, Privilege.*
privilege of, not so early settled, 380 *b*.
CONVEYANCING communications, 380 *c*.
CONVICTION, at law, in criminal matters, 432.
COPIES of attested instruments, admission of, not admission of the (execution of the) originals, 146 *c*.
certified, what, made evidence, 155.
of certain official and other documents made evidence by act of Parliament, 157, 190 *b* and *c*.
certain made admissible, 157 *et seq.*
see *Documents, Statutes.*
of deposition lost, refusal to record and exemplify, 111 *e*.
of Records, what, evidence, 410 *a*.
See *Attested Copies, Copy, Depositions, Examined Copies, Interrogatories, Office Copies.*
CO-PLAINTIFF, not examinable without consent, 339.
COPY,
of a deed or will, not evidence, when original producible, 247 *b*.
of a (mere) copy of a *fi. fa.* rejected, *ib.*
being admissible, yet what only purports to be substantially a copy is not admissible, 268 *c*.

COPY—*continued.*
of record or *quasi* record, not sealed, but authenticated by the signature of the Judge where the Court has no seal, 154-5.
examined, of record of a fine, 165 *d.*
examined (and sworn to) of record, 159.
how prepared, *ib. e.*
by one in an official situation, not therefore evidence, 159.
of entry in book of Commissioners of Stamps, to prove payment of legacy duty, how to be proved, 159 *f.*
of a document, not evidence, at law, on mere notice to produce, unless original in the possession of the other party, 274 *a.*
of all the Registrar has taken down, (in his Minute Book,) may be demanded, 533.
machine, of letters, 273 *d.*
printed by Queen's Printer of act of Parliament, 148 *c.*
examined, of a record, 148 *e.*
printed, of a private act, 148 *f.*
purporting to be printed by the Queen's Printer, of Private and Local and Personal acts of Parliament, not Public acts and Royal Proclamations, 148-9.
purporting to be printed by the Printer to either house of Parliament, of the Journals of either house of Parliament, 148-9.
of Court Rolls, 167 *b.*
of powers of Attorney, enrolled in the office of Record in Jamaica, 419 *d.*
of Terrier, rejected, 312 *e.*
see *Attested and Certified Copy.*
COPYHOLD ENFRANCHISEMENT, presumed, to support long enjoyment, 485 *c.*
COPYHOLD, SURRENDER OF, entry of, by steward, parol evidence admitted to explain, 276 *d.*
presumption as to, 480-1.
see *Admittance, Record Book, Surrender.*
COPYHOLDER, estate of, evidence of, 155 *a.*
COPYRIGHT; see *Piracy of.*
CORNWALL, DUCHY OF, acts affecting possession of, public acts, 166 *a.*
CORONER, examinations before, use of, 262.
verdict on inquest by, 438.
CORPORATION,
answer of, as to costs, 11 *d.*
books of, inspection of, rules of Common Law Courts and Courts of Equity as to, 7.
of London, muniment room of, 167 *c.*
books of, 167 *b, c,* and *d.*
possession of, 167 *e.*
how far public, and open to inspection, 170-1.
proof of, 186 *f.*
entries in, not evidence as to right to appoint a curate, 312 *a.*
deed by, delivery of, 177 *a.*
CORPORATION—*continued.*
document or proceeding of, receivable in evidence by any act of Parliament, 157-8.
evidence of being freeman of, 367-8 *a.*
members of, incompetency of, 356.
member of, how disfranchised to render him competent, 375 *c.*
seals of, instrument under, memorandum on by Secretary, not an attestation, 174 *b.*
CORRESPONDENCE, letters forming, 186 *c.*; see *Secretary of State.*
CORROBORATION of testimony, 4.
CORROBORATIVE circumstances, to support the testimony of a single witness, against a direct and positive assertion in an answer, 227.
COSTS,
answer read by defendant as to, 11 *d.*
of bill of discovery, filed by a defendant to a bill for relief, order as to, 195 *c.*
of a commission to examine abroad, 120 *f.*
of the solicitor disallowed, 118 *c.*
of cross bill and answer, order as to, 195 *c.*
of defendant examined, paid by the plaintiff, 338 *g.*
of depositions suppressed, payment of, a condition precedent to a new commission, 127 *a.*
of evidence, order as to, 193.
of evidence not read, nor entered as read, 212 *b.*
of evidence not allowed to be read, on a bill of revivor, 537 *c.*
of evidence not read, nor entered as read (in one case) disallowed, 533 *c.*
of and consequent upon a reference, for scandal or impertinence, 218 *b.*
of scandal generally, 218 *c.*
of new evidence, occasioned by the negligence of a party, 537 *b.*
as to scandal and impertinence, 216.
of impertinence, in an examination, 218 *b.*
in depositions or interrogatories, 229 *c,* 230 *c.*
liability for, ground of incompetency, 351-2.
liability over for, as affecting competency, 363.
occasioned by a party insisting upon having evidence by depositions to interrogatories, instead of by affidavits, 511 *c.*
occasioned by delay, 138 *c.*
occasioned by error of solicitor, 222 *a.*
pauper plaintiff (under certain circumstances,) ordered to pay good, or be whipped, 151 *a.*
see *Expense of an Inquiry.*
COTEMPORANEOUS, declarations or statements, as to pedigree, &c. need not be, 324.
COTTONIAN MSS., Report on, 166.
COUNCIL of State's Office, papers in, 169 *b.*
of York, Court of, depositions in, 258 *g.*

COUNSEL,
advising with, as to evidence, costs thereof allowed, between party and party, 52 *c*.
Mr. Plumer's observations on the meagre instructions, to advise upon evidence and draw interrogatories, 73 *a*.
admissions by, conclusive, 458.
authority of, 458-9.
cases and opinions of; see *Production of Documents*.
duty of, to weigh the credit of each witness, or other means of evidence, 472 *a*.
errors of, cases of, defects supplied, 197, 198-9.
notes on brief of, at trial at law, 304 *e*.
used in a suit in Equity, 379 *b*.
in a foreign country, case laid before, and opinion given by, privileged, 378 *f*.
to prepare, but need not sign, interrogatories to be settled by the Master, 516 *a*.
signs examination returned to interrogatories settled by the Master, 520.
restricted in their testimony, 378; see *Privilege*.
remonstrance of, 230.
addressed to Brougham, L. C., 202, 212.
certificate (as to practice), furnished to by officers of Court, 402 *a*.
to attend a defendant examined on interrogatories, after insufficient answer, 211.
concerned in the cause, not to act as commissioner, 101 *a*.
signature of, to case sent to a Court of law, 531 *j*.
see *Court, Judges, Special Circumstances, Verbal Inquiries*.
COUNTERPART OF LEASE; see *Leases*.
COUNTER STATEMENT, laid by a party, before a Master, 504 *e*.
objection to, waiver of, 505 *b*.
COUNTRY, custom of, evidence as to, for interpretation or explanation of written instruments, 280 *f*.
COUNTY, history of, not evidence, 398 *f*.
name of, mistake in will as to, 285 *c*.
Palatine, fines and recoveries in, exemplifications of, 413 *d*.
Palatines, seals of, 413 *d*.
COURSE OF NATURE (as to rain) taken notice of, 396 *b*.
COURT,
and name of cause, to be mentioned in an affidavit, 539 *d*.; see *Admiralty, Christian or Ecclesiastical, Common Law, Equity, Exchequer*,
assuming the power of legislating, danger of, 303 *a*.
Baron, judgment of, action at law on, evidence in, 435 *a*.
rolls of, 167 *b*.
of competent authority, power of, 425.
of competent jurisdiction, certificate of, conclusive, 438.
COURT—*continued*.
of Conscience, proceedings in, 170 *e*.
Ecclesiastical and Civil, no less than those of Equity and Common Law, use the very same rules as to evidence, 296 *a*.
of Equity, concurrent and controlling authority of, 431.
rule in, as to reading parts of an answer, or an examination, 467 *e*.
of Equity, rule of, as to reading the answer in the cause, and an answer in another cause, 468 *e*.
inferior, rolls of, 167 *b*; see *Manor*.
inspection of proceedings in, 169-70.
of Law, may issue a commission to examine witnesses abroad, on an issue directed out of Chancery, 118 *a*.
as to cases of difficulty, as to parties to whom a commission is to be directed by, 118 *f*.
powers of ordering examinations *de bene esse*, 257.
rule of, as to reading the whole of an answer or examination, 467 *e*.
jealous (formerly) of the use made of them by Courts of Equity, 531.
sending to, for decisions, Lord Chancellor Eldon's observations as to, 530.
on case sent, will not answer a speculative question, 531 *h*.
nor as to the construction of equitable estates, 531 *i*.
certificate of, on case sent to law, 532; see *Military Court of Inquiry*.
protection, &c. (or satisfaction) of, by affidavit, testing the knowledge of the party, 539.
of Record, which are such, 150 *e*, 153 *d*; see *Chancery, Records*.
records of any, except Chancery, exemplified under the Great Seal, or the Seal of the Court, 412 *d*.
seals of, notoriety of, 412-13.
with a seal, Act of Parliament constituting, seal proves itself, 413 *c*.
security, or satisfaction of, affidavits used for, 538 *d*.
acts of; see *Decree, Order*.
Superior; see *Seal of Inferior, Arches, Court of*.
any other, depositions taken in, 164 *a*.
see *Admiralty, Bankruptcy, Bishops' Courts and Registers, Chancery, Chancery in Ireland, Civil Law, Common Law, Consistory, Contempt of, Council of York, Court of Conscience, Ecclesiastical, Examination in, Examiners, Insolvency, Judicial Notice, Judge, Officers of the Court, Private Room, Satisfaction of, Survey, Vivâ voce, Wales, Ward of, Witness at Law remaining in*.
COURT ROLLS, burnt, exemplification of, use of, 410 *d*.
copy of, 155 *e*.
what copy requires stamp, *ib*., 167 *b*
inspection of, right to, 170 *d*.

COUSINS; see *Commissioners, Relative.*
COVENANTS, special, presumption as to, 479 *b.*
COVERTURE, former, declarations made during, 315 *a*; see *Husband and Wife.*
CRAVINGS, bill of; see *Sheriff.*
CREDIBILITY,
the Court of Equity alone to weigh, 472 *a.*
of declaration, oral or written, by persons deceased, distinguished from admissibility of the evidence of such, 309 *k.*
of declarations and statements, as distinct from admissibility, 323 *c*, 324-5.
interest of witness affecting, 327 *s*, 330 *c.*
objections as to, the same as those heretofore as to competency, 336 *d.*
of a witness, being of kin, &c. to a party, 336 *d.*
of men, not yet equal, 471 *a.*
of a witness, how ascertained, trial of, by a jury, 5 *b*, 337 *a.*
in general, referred to in articles to discredit, but no particulars to be entered into, 208.
still affected by infamy, and the like, 333.
even prior to the late Act, interest an objection to, 346-7.
see *Credit, Discredit.*
CREDIBLE WITNESS, to a deed, in execution of a power, wife of appointee not, 174 *a*, 341 *d.*
CREDIT OF A WITNESS,
examination to impeach, 204, *et seq.*
how may be impeached, in the Ecclesiastical Courts, 204 *c.*
distinct from his competency, 206 *c.*
CREDIT,
examination as to, sparingly to be granted, order as to, 205.
examination to, when, 208.
evidence to, taken on examination in chief, impertinent and suppressed, 205 *s.*
examination to, after publication, but to competency before, 330 *d.*
witness as to, at law, not impeachable by party calling him, 209 *d.*
due to witnesses, 469.
due to witnesses respectively, on the question, an issue directed, 523 *d.*
of every part of an answer, affidavit, or examination not equal, 467 *e.*
side of an account readable to discharge, when debet side read to charge, 467 *a.*
witnesses undeserving of, 175 *a.*
due to each kind of proof, from *primâ facie* to conclusive evidence, 394 *a.*
persons who having attested wills are afterwards called to impeach the execution of them, 386; see *Belief.*
an answer, how estimated, 19 *a.*
a defendant, examined as a witness, and being interested, 327 *s.*
a witness, counter evidence, to support, 209 *b.*; may be hearsay, 209 *c.*
CREDIT—*continued.*
due to a witness, interrogatories for an examination as to, 61 *b.*
of a witness in the Civil Law Courts, 330 *c.*
of witnesses, by whom tried, 725.
to be given to a witness, to an Infidel less than to a Christian, 471 *a.*
CREDITOR,
admission of, by an entry, 464 *b.*
not restrained from suing an executor at law, although accounts and inquiries preliminary ordered and directed, 490 *a.*
of deceased, who proves himself to be, can demand a reference to the Master, to take an account of his property, 490-1 *a*; see *Claimant, affidavit by, Legacy, &c.*
competent witness, to a will, since 1837, 184.
examination of, on a reference, 506 *b.*
advertisement for, 510.
of a bankrupt, consent of, to a suit by the assignees, 478 *f.*
bill by other, against a partner, his answer to it, read against his partner, in an action at law, as an admission, 468 *c.*
incompetency of, 352 *d.*
of bankrupts, incompetency of, 353.
Master at liberty to examine, and how, 519-20.
suit of, to obtain the usual decree in, 491 *a.*
CRIME, incapacity from, removed by the Act for improving the law of evidence, 325.
incompetency arising from, 325.
which render a person infamous and incompetent, 333-4.
See *Incompetency.*
CRIMINAL
act, witness not bound to admit, 83 *g.*
courts, on a question of insanity of the accused; see *Medical Man.*
knowledge or intention, evidence (at law) to show, 235 *b, c.*
law, a point of, determined by the Lord Chancellor, sitting in Equity, 1 *b.*
matters, verdict in, inadmissible, as evidence of facts, 432-3 *d*; see *Guilty, Plea of.*
proceedings, strictness in, as to use of abbreviated office copy, 150, *f.*
non use of office copies of proceedings in Chancery, 153 *a.*
trial, verdict in, non use of, in evidence, 432.
charge, witness not bound to answer, to subject himself to, 81.
cause, in such no consent (even) would warrant the examination of a witness on interrogatories, 49 *d.*
CRIMINATE, defendant, matters tending to; see *Discovery.*
CROSS of a marksman, proof of, 267 *c.*
Suit, publication of evidence in, 12 *b.*

CROSS-BILL,
power of defendant to file, 12.
costs of, answer to, use of, 12 *b.*
dismissed, yet depositions in that suit may be available in original suit, 195 *b.*
taken *pro confesso*, may be read at the hearing of the original cause, 195 *c.*
and answer thereto, costs of, order as to, 195 *c.*
answer to, reading and use of, order as to, *ib.*
to put in issue letters, come into the possession of the defendant after answer, 196 *c.*
filed by a defendant, as to right to enlarge publication, 139 *d.*
answer to, when not read, 427 *f.*
see *Cause, Cross-cause, Depositions.*
CROSS-CAUSE, costs of, order as to, 195 *c.*
evidence in, relevant to matters in issue, in cause, not available after decree in cause, 195 *d.*
depositions in, use of, at the hearing, order as to, 194.
taken after publication of depositions in cause, not available, 195 *c.*
taken, without leave, after publication in the cause, 220 *c.*
CROSS-EXAMINATION,
substitution for, 12.
of attesting witnesses, or as to decease and handwriting of, 189 *c.*
of a witness, opportunity of, afforded to the other side, 469 *b.*
the want of, an obstacle to the proceeding upon affidavits, 511 *c*, 540 *a.*
seeming necessary, where evidence by affidavit admitted, power to resort to interrogatories, &c., 511 *c.*
of a witness, how far waiver of objection to, 369-70.
time for, not having been given by commissioners abroad, 223 *f.*
opportunity of, lost by neglect, 223 *c.*
of witness abroad, opportunity given for, 222 *c.*
witness dying before, 223 *c.*
witness refusing to submit to, *ib. d.*
of country witnesses, brought up to Town, in Town, 223 *b.*
as well as examination of a witness, to be repeated, when the depositions have been suppressed, 203 *f.*
liberty of, to the other party, when re-examination, allowed, 200 *c.*
of witness re-examined, after suppression of depositions for irregularity, to be repeated, 225 *a.*
in the Exchequer, 223 *c.*
of a witness brought to Town, *ib.*
in what cases recommended, 75.
want of effective, 75; see *Examination.*
Mr. Bell's practice as to, 75 *a.*
after publication, sometimes allowed, 75.
CROSS-EXAMINATION—*continued.*
of a witness, at law, necessary prior to calling another to contradict him, 204 *d.*
secus in equity, 205.
of a witness (at law) notice to, prior to discrediting him, 204.
of a witness, a new commission for, in a special case, 106 *c.*
by commissioner, *ib.*
not being requisite as to an exhibit, it may be proved by affidavit, 147.
an examination of a witness in the nature of, 184 *c.*
may not be read, unless the party who produced the witness uses his examination, 387 *a.*
of a witness proving an exhibit, *vivâ voce* at the hearing, not permitted, 191 *b.*
in the proof of an examined copy, 190.
as to execution of deeds, 71 *a.*
defendant to a bill of discovery and for a commission, to confine himself to, 70 *b.*
of a witness (by the Examiner) in Court, 70 and *b.*
in Chancery of Ireland, 61 *d.*
in Bankruptcy, *ib.*
in Exchequer, *ib.*
interrogatories for, 61.
CROSS-INTERROGATORIES, or Interrogatories for cross-examination of a witness, 61.
motion to suppress for irregularity, must be before publication, 219 *b.*
filed and added to those already exhibited, 102 *g.*
as to incompetency, 329.
CROWN,
Steward of, 165 *g.*
charters and grants from, usage to explain, 281 *d.*
lands, an extent of, 165 *g.*
or its lessees, title of, suits as to, documents and copies available, 166 *a.*
presumption against, from great length of possession, 485 *a.*
presumption against, in favour of long possession, 485.
title of, to lands purchased of a subject, 165 *g*; see *Attorney General, Cornwall, Duchy of, King, Land Revenue, Majesty, Queen, Office of, Printer to Queen, Sign Manual, Records and Inrolments, Remembrancer, Revenue, Royal Proclamations.*
CURATE, right to appoint, question between vicar and corporation, 312 *a.*
" CUSTODY,
or Power," construction of the words, 274 *c.*
proof of, in proving letters, accounts, &c., 186 *f.*
of the drafts of depositions, 111 *c.*
of a document, 186 *f*; see also *Books, Deeds, Pedigrees, Terriers, Wills, proof of.*

CUSTODY—*continued.*
of the law, anything impaired under, remedy as to, 453 *b.*
of Records, 169 *f.*
proper, written pedigree should come out of, as family papers, 319 *c.*
receipts to come out of proper, 311 *f.*
of account book or document, proof of, to let in entries therein, by certain persons deceased, 313 *c.*
of documents, plan of, 173 *e*; see *Document, Deposit, place of.*
of a document, proper, sufficient, although not most proper, 166 *b.*
of document (even) not proveable by interested witness, 375 *d*; see *Possession.*
CUSTOMARY HEIR; see *Heir-at-Law.*
CUSTOMS,
local, proof of, 236.
of one manor adduced to prove those of another, 235.
manorial, proof of, 235-6; see *Manor, Manorial, Parochial.*
manorial or parochial, evidence of reputation as to, 306.
of bankers, taken notice of, 396 *b.*
of Merchants; see *Merchants.*
of trade; see *Trade, Usage of.*
proof of in Ecclesiastical Court, 441 *c.*
of the country, fixing commencement of tenancy, 479 *b*; see *Country, Provincial.*
of London, how certified, 253 *d.*
once certified is law, *ib.*
CYPHER; see *Decyphering, Translating.*

DANCER, Mr. (Examiner) his evidence, 75.
DATE, reference by Court, to Almanac, to supply, 396 *a.*
expressed in a deed, parol evidence to vary or add to, 288.
of instruments enrolled, 418-19.
of deeds enrolled, 418-19 *a.*
of a deed; see *Ancient Deed; Deed.*
DAUGHTER; see *Relative.*
DEAD, witness being, 133; see *In perpetuam rei memoriam.*
one not to be found, as if, 252.
see *Attesting Witness, Handwriting.*
DEAF AND DUMB persons, examination of, 331 *c.*
DEALING with property, how tending to prove ancient will, 186 *a.*
DEAN AND CHAPTER, deed by, delivery of, 177 *a.*
DEATH
of witness, as letting in secondary evidence, 249.
see *Parish and other Registers.*
proof of, 249-50, 476 *a.*
presumption, as to, 250, 483 *a*, 488 *b.*
of attesting witness, being alleged; nevertheless handwriting not proveable, at hearing, 189 *e.*

DEATH—*continued.*
of witness, even after his depositions *de bene esse*, having been taken irregularly, had been suppressed, 221 *h.*
of a person not proveable by production of probate of will or letters of administration, 250 *a.*
proof of, by copy of register, under 6 and 7 Wm. 4, c. 86, insufficiency of, 250 *a.*
of a person, further evidence as to, 199 *d.*
of persons, having made a declaration or entry, proof of, to let such in, 313, *b.*
of husband of woman marrying again, presumed, 480 *b.*
of *cestuis que vies, &c.*, presumed (by the several Acts), 482-3.
what not *primâ facie* evidence of, 390 *a.* see *Administration, Letters of, Will, Probate, copy of.*
issue as to, 523 *c.*
without issue, proof of, by hearsay evidence, 320 *d.*
probate, &c., not proof of, 414 *a.*
decree to establish a will not evidence of testator's decease, 424 *e*; see *Alive, presumption as to a person being still; Bibles, entries, in.*
priority of; see *Survivorship, Witness Dying.*
DE BENE ESSE,
grounds for examination, 121.
examination of witnesses, 121 *a*; see *Interrogatories, Examination of Witnesses on, at law*, 121 *d.*
examination of a witness, why discountenanced, 122 *b.*
to examine witness, time for motion, 123.
examination of a witness, notice to other party, 124 *g.*
commissions for the examination of witnesses, sorting, entering, and preserving, order as to, 135 *b.*
depositions taken, publication of, 142-3.
when unavailable, at law, 143.
common order as to publication, 143 *b.*
published irregularly, 145 *f.*
publication of, motion for, affidavit on, 253 *b.*
use of, as secondary evidence, 256.
irregularly, suppressed after death of the witness, 221 *g.*
commission to examine, execution of, notice of, necessity of, 220 *a.*
examination of a defendant, and of guardian of plaintiff, 339 *d.*
depositions taken, at Judges' Chambers, *quasi*, office copy of such, 153 *b.*
examinations, at law, 257 *f.*
use of, in equity, *ib. g.*
depositions taken; see *Affidavit, Ex parte, Abroad, &c.*
DEBET side of an account being read to charge, Credit side readable to discharge, 469 *a.*

DEBT,
witness bound to answer as to, 83-4 *a*.
proof of, 512 *f*.
charge and direction by will for payment of, 183; see *Bankrupt, admissions by; Claimant; Claimant, affidavit by; Creditor; Creditor, legacy to.*
an offer to pay, not binding a party as an acknowledgment; see *Compromise.*
DEBTOR AND CREDITOR Account, (before the Master) verified by affidavit of the party, and forms the basis of the investigation, 515 *b*.
DEBTORS, declarations by, with regard to the property in goods seized, 313 *d*.
DECISION of competent tribunal, not questionable, 475-6 *a*.
DECLARATIONS
by persons since deceased, use of, 308.
of an agent, made otherwise than in the course of the transaction alluded to, not admissible, 310 *b*.
written or signed by such agent, as available, though he still living, 310 *b*.
by persons since deceased, against interest, available when written or signed by agent duly authorized, though not written or signed by themselves, but adopted only, 310 *b*.
by persons, since deceased, proved to be relations, to prove relationship, 317-18.
by persons, since deceased, made in the course of duty, or contrary to their own interest, 308 *d*, *e* and *f*.
by an agent, but not as agent, not binding on principal, 464 *c*.
by persons, since deceased, by verbal acknowledgment of trust, 309 *f*.
by persons, since deceased, proved to be relations, to prove relationship, not admissible, if depositions read, 318 *c*.
of dying persons, by way of confession, evidence of, in cases of homicide only, 316.
instances of admission of, evidence of, as to forgery, 315 *c*.
ground of the admission, 316 *a*.
observations as to the use of, 315 *c*.
by executors, before becoming such, 313 *d*.
by husband and wife; by wife, during former coverture, or as to her own estate, 315 *a*.
by intestate, 313 *d*.
by occupant, since deceased, as proof of ownership, 309 *b*.
by owner, of having assigned, 309 *e*.
by persons who have "complete knowledge," but "no interest;" doubt of Lord Eldon, as to admitting evidence of, 315 *a*.
doctrine in the Sussex Peerage case, 315 *b*.
by persons, parties on the record at law, since stat. 3 & 4 Vict. c. 26, 313 *d*.
DECLARATIONS—*continued.*
by a person, *in pari casu*, 324.
by a party to a deed, evidence of, for construction, 284 *c*.
by a party to the record, 460 *b*.
of relations as to pedigree, evidence; but not conclusive, without showing on what occasion, &c., 317 *f*.
by tenant, as to ownership of timber, 309 *d*.
of tenant, since deceased, as proof of ownership, 309 *b*.
by a testator, evidence of, 283 *d*.
to explain a will, admissible against executor, 313 *d*.
in a codicil to a will, 282 *c*, *ad finem*.
in writing of vicar, since deceased, available to one claiming in right of the vicarage, 311 *f*.
by a wife, 344-5.
by a witness, 98 *c*.
by an acceptor of a bill, since deceased, in presence of the holder, admissible against him, 313 *d*.
identity of persons having made, to be proved, 325 *b*.
by debtors, with regard to the property in goods seised, 313 *d*.
made *post litem motam*, 321.
false, danger of, made *post litem motam*, 322.
after the state of facts had arisen on which the claim founded, 323 *a*.
made with a view to a controversy, 323, *et seq.*
not cotemporaneous, 324.
by persons, since deceased, the whole context must be taken, 309 *a*.
in the nature of admissions, 308 *f*; and see *Admissions, Agent.*
voluntary, under the stat. 5 & 6 Wm. 4, 540 *h*.
written, no less than spoken, may be but hearsay, 304; see *Admissions in Answers, Age.*
credibility, not the admissibility, affected by the fact of the persons having been overcome with liquor, 316 *b*.
see *Agent, Assignee, Cestui que trust, Declarations, Order for an Issue, Statutory, Trustee.*
DECREE,
in Chancery, recitals in, 162 *e* and *f*.
orders as to drawing up, 162 *f*.
original, form of, to contain "a description of the evidence read," 212 *b*.
mode of drawing up, evidence of Master Horne as to, 423.
form of, as referring to evidence which was read, 536 *b*.
form of, exhibits mentioned in, 533 *b*.
proof of, at law, 161 *a*.
used as evidence at law, to explain circumstances, 422 *d*.
in other Courts, Order as to reading, 256 *b*.
given in evidence, in another suit, &c., 359 *c*.

DECREE—*continued.*
cannot be founded on matter not in the pleadings, 234 *f*.
what, not evidence of, 424.
proof of, 424 *c*.
until signed and enrolled, cannot be pleaded, 422.
on this account not pleadable, defence by answer, 422 *b*.
enrolled, and no order to examine a party, Court will not order him to be examined, for the discovery of deed-, 501 *b*.
enrolment of, rendering mistake for not entering evidence as read irremediable, 534 *b*.
signature of Judge to, judicial notice of, 413 *h*.
taken by the plaintiff, defendant not appearing, evidence not entered, 533 *d*.
by consent, yet evidence entered, 533.
in another cause, between the same parties, may be read without order, 421 *c*.
in other Courts, may be read, on hearing, without special order, 162 *d*.
in other Courts, order as to reading, 425 *b*.
effect of, 421.
effect of finding deeds after, 6 *a*.
for reference to a Master, form of, 501.
in House of Lords, difference in, produced by evidence rejected below, 533 *c*.
as to a right, 422 *c*.
see *Chancery Commissioners, Report of; Minutes of; Modus; Order on a Reference being made under; Will; Warrant to consider.*
DECYPHERING an instrument written so as to be scarcely legible, 280 *b*.
DE DIE IN DIEM, Commissioner to proceed, 109 *c*.
DEED,
ancient, possession going along with, 185 *d*.
exhibits, proof of, 146, and Appendix.
proof of, as an exhibit, at the hearing, failing; leave given to exhibit interrogatories to prove, 189 *i*.
construction of, being the matter disputed, fraud as to execution of, not allowed to be proved, 232 *b*.
contents of, secondary evidence of, 268 *c*.
of conveyance, 173 *f*; see *Conveyance, Term, Transfer.*
enrolled, in Courts of Record, for safe custody (but) not Records, 416.
an order to enrol, 416 *e*.
not holpen (in general), by evidence, inferior or other, in lieu of the proper evidence, nor by extrinsic, in aid of it, 276-7 *a*.
executed in India, proof of, 265 *a*.
execution of, cross-examination as to, 71 *a*.
formalities of, readily presumed, 482.
found after a decree, 6 *a*.
immoveably deposited, how proved by copy, and why, 149 *c*.
inspection of, 452.
lost, evidence of, at law, 268 *e*.

DEED—*continued.*
if impeached, not proveable as an exhibit, 189 *g*.
or if circumstances, as to the execution, disputed, *ib*.
but may be when the validity, not the execution, denied, *ib*.
being lost, &c., what evidence becomes admissible, 270.
parol evidence to vary or add to, only as to consideration or date, 287 *a*.
presumption of, in support of possession and enjoyment, 485 *b*.
preparation and execution of, solicitors books, charges for, use of, as secondary evidence, 271 *c*.
communications respecting the preparing, confidential and privileged, 380 *e*.
proof of, on behalf of plaintiff, although produced by defendant, 45.
ought to prove itself, and be proved by others, 451-2.
proved by attesting witness, 173 *f*.
proof of, signing, sealing, delivering, and identity of the parties, 176-7.
recitals in, as evidence of pedigree, 319 *f*.
recital of, in a deed, 462 *b*.
requisites of, legal part tried by the Judge, matters of fact by a jury, 451.
when validity only questioned may be, when circumstances disputed may not be, proved as an exhibit, 172 *f*.
validity of, form of issue to try, 524 *a*.
variation of, and addition to, by the Court, 289, *et seq*.
a man not permitted to invalidate his own, 475 *a*.
examination of attesting witness to prove execution of, 189 *c*.
where answer disputes the construction only evidence inadmissible as to its execution, 458 *a*.
execution of, for proof of, statutory declarations, 460-1.
executing a power, 174 *a*.
attesting witnesses to, 173 *f*.
attesting witnesses to, abroad, dead, incompetent, or interested, 263 *e*.
witnesses to, admitted to impeach, 386 *a*.
for construction or explanation, use of extrinsic evidence, 283 *d*.
construction of; see *Written Instruments.*
alterations, erasures, and interlineations in; see *Consideration, Execution, Fraud.*
discovery of, after decree; see *Decree.*
see *Documents, production of; Draft; Enrolment of; Enrolment in Chancery; Execution; Exhibit; Fraud; Instrument; Lost Document; Memorial; Middlesex; Register; Recitals; Stamp.*
endowment; see *Charity.*
party to; see *Declarations by.*
DEFAULT, made by the party having the carriage of a commission, 97 *d*.

DEFAULT—*continued.*
of party having carriage of a commission, other may apply, 97 *d.*
in trial of an issue, consequences of, 525.
wilful, by a defendant, an executor, to obtain decree as to, 27.
DEFECT, of a document in writing, in point of explicitness, 276.
of evidence, relief in cases of, 196.
of proof, special cases of, leave given to supply, 197-8-9.
See *Delay, Diligence, Laches, Negligence, Omissions.*
DEFENDANT,
denial in his answer, effect of, as against the testimony of a single witness, 4, 5.
distinct and positive assertion in his answer, sufficient to meet the testimony of single witness, not corroborated by circumstances, 227.
when a direct positive assertion in his answer, is met by the corroborated testimony of a single witness, may withdraw, and pray an issue, 227-8.
right to an issue when his answer is opposed by evidence of single witness aided by circumstances, 523 *h.*
examination of, on trial of an issue, when single testimony against answer, 272.
denying notice, 388 *b*; see *Notice.*
not putting in an answer, 494.
evidence of, used against another, old cases as to, 340 *f.*
right to discharge himself of sums, under 4*l.* each and 100*l.* in all, by his oath, 364 *b.*
compelled to furnish testimony, 337 *c*; see *Discovery, Party.*
against whom depositions in former cause available, 259 *et seq.*
his right to use parol evidence, in certain cases of suits for the specific performance of agreements, 290-1.
in Courts of Equity, may be examined as a witness, on behalf of the plaintiff, or of any co-defendant, 327 *d.*
not appearing, decree taken by the plaintiff such as he can abide by, evidence not read at all, 533 *d.*
duty as to answering directly and particularly, 24.
when he may examine witnesses, 94 *a.*
examination of, upon interrogatories, old order as to, 338 *g.*
may examine plaintiff, with his consent, 339 *b.*
may examine co-defendant, 339 *g.*
examination of (as a witness), effect of, 340.
having himself examined witnesses, not competent to testify as to that point, 340 *f.*
examination of, on reference, or trial of an issue, 341.
DEFENDANT—*continued.*
examination of, after third insufficient answer, 210-11.
to be examined on interrogatories, only "in a very special cause," order as to, 210 *e.*
already examined as to accounts, re-examination of, 196 *b.*
examination of, Order (by Bacon, C.) as to, 506 *b.*
and co-defendants, examination of, 506 *b.*
already examined and cross examined, ordered to be re-examined, but "as the Master should think reasonable," 506 *b.*
out of the jurisdiction, inquiry whether, 492 *a.*
on exceptions to report, may all argue upon evidence produced by another, 517 *c.*
examination of, order for, saving just exceptions, 327 *d.*
interest not such exception, but only to affect his credit, 327 *e.*
statements made on interrogatories, refusal of means of falsifying, 209 *e.*
submitting to answer, must answer fully, 19 *a.*
not bound to answer to criminate himself, 81 *d.*
a witness, submitting to answer must answer fully, 24 *d.*
see *Answer; Examination of a Party; Party, order to examine; Witness made a Defendant; Witness; Wrong-doing of.*
DEGREE; see *Universities, Books of.*
DEGREE of consanguinity of declarant to person referred to, not necessary to let in declaration, 317 *b.*
DELEGATES, Court of, use before, of depositions in Chancery, 258 *g.*
DELAY,
likely to be great, the Court requires more, 117 *b.*
may preclude a party from having relief, 196 *b.*
objection on account of, 116.
occasioned by unnecessary examination, how avoided, 113 *b.*
costs occasioned by, 138 *c.*
examination to discredit witness not allowed to cause, 208.
terms imposed, not to cause, 117 *h.*
unreasonable, in return of commission to examine witnesses abroad, 120 *b.*
DELIVERY of Deed, proof of, 176.
when presumed, 176 *d.*
presumption of, 482.
of Goods, proof of, by entries in books, by servant since deceased, 313 *e, f,* and *g.*
of a Letter, *primâ facie* evidence of, 186 *c.*
see *Sending Letter.*
DEMAND, letter of a party, evidence for himself as such, 187 *c.*
proof of, 242, *ib. c.*; see *Claim*; *Release, Joint and Several.*
DEMURRER,
effect of, 10; see *Answer in form of.*
effect of, plenary admission, 22.

DEMURRER—*continued.*
to a bill to examine witnesses *de bene esse*, 124 *d*.
to a bill of review, effect of, 534 *b*.
overruled, plaintiff may read other evidence, as on a rehearing, 536 *d*.
to evidence, at law, now rarely put in use, 77-8 *d*.
to interrogatories, term explained, 77 *d*.
form of, 79.
supported and opposed by affidavits, *ib. f*.
grounds of, 80.
by public officer, 377.
why rare, 87.
late case of, *ib*.
to be returned with the commission, 108 *e*.
hearing and costs of such, 87.
overruled, when witness may demur anew, 87 *h*.
for impertinence, suggestion as to, 218 *g*.
DENIAL; see *Answer, Defendant*, 4, 5.
DEPOSIT
of deed, &c., irremovably, 149 *c*.
of deeds; see *Equitable Mortgage*.
of documents, with the Master, order for, 45; see *Master*.
resistance of the order for, 46.
of original document, place of, necessity to to prove, 159-60.
by exceptant to Master's report, given up, 521 *d*.
DEPOSITIONS,
to be in the first person, 68 *d*.
read over by the examiner to the witness, 68.
signed by the witness, 68.
unsigned, unavailable in evidence, 69 *a*.
may be varied or added to before signature, 69.
not after, *ib*.
although such signed by him, how far errors may be corrected, 69 and *ib. b*.
omissions in, what and when, may be supplied, 69 and *c*.
mistakes of examiner, when may be corrected, 69 and *d*.
before the examiner, disposal of, 71.
to be kept secret, 71 *c*.
after publication, given by the examiner to the clerk, who makes copies for the parties, &c., 71-2.
copies of, made for the opposite party, how signed by the examiner, to authenticate, 72.
Lord Eldon's observations as to trash in them, 77.
of witnesses examined by commission; title, form, and heading, 103.
all to be in the first person, 104 *a*.
taken *de bene esse*, publication of, 142-3.
in a suit to perpetuate testimony, by consent published, living the witness, 51.
DEPOSITIONS—*continued.*
as to reading and using, 131.
exemplification of, 133.
use of, 135 *b*.
publication of, ancient Orders, 141.
Lord Bacon's Orders, 142.
required to be used at law, order, 142 *g*.
reading of, at law, 256 *b*.
(under ancient order) against whom may be used, 142 *c* and *d*.
after seeing, leave to examine a witness, when and why, 140-1.
in suits in Chancery, since the time of Henry 8, in the Tower, 151.
custody of, 152.
office copies of, 152.
used in another cause, in Chancery, 152 *h*, at law, 153 *a*.
taken *de bene esse*, at Judge's chambers, *quasi* office copy of, 153 *b*.
in Chancery, office copies of, good evidence, in a civil proceeding, at law, 153 *a*.
exemplifications of, 160 *c*.
use of, to prove the existence of the deponent, at the time, 161 *b*.
when bill and answer lost, 163 *d*.
when bill, answer, and decree lost, *ib. e*.
taken in any other Court, Lord Bacon's Order as to, 164 *a*.
when commission lost, 163-4 *a*.
when commission produced, *ib*.
in cross cause, use of, at hearing of cause, Order as to, 194.
in a cause, not available in cross-cause, if point in issue varied, 195 *d*.
in another cause, order to use having been obtained, use of, without order, by the adverse party, order as to, 195 *f*.
of witness before Commissioner, amending, 105-6, *c*.
must be signed, 106, *d*; *et vide supra*, 68 *d*.
paper draft of, signed, 106, *d*.
sealed up, and how and why kept, 111, *e*.
taken by Commissioners, entry of adjournments, and causes of delay, 109 *c*.
engrossed on parchment, 109-10, *a*.
engrossment of, subscribed by witness, 110 *c*; *et vide supra*, 68 *d*.
lost, use of draft copies, 111.
but copies not allowed to be recorded and exemplified, 111 *e*.
in a foreign language, 119.
motion to have them delivered out to be translated, refused, 119 *e*.
under a commission to examine witnesses abroad, 119-20.
de bene esse, refusal to deliver out, 142 *g*.
suppressed, for being taken on leading interrogatories, defect supplied, 197 *g*.

DEPOSITIONS—*continued.*
having been suppressed, the cross-examination as well as the examination to be repeated, 203 *f.*
of same witness, in another cause, as to reading, to contradict his own evidence, 208 *f.*
taken under leading interrogatories, process to have suppressed, 213 *a.*
new interrogatories, *ib.*
not suppressed before the hearing, unless party ought to be allowed to examine again, 219 *b.*
to be legibly written, or suppressed, 220 *g.*
expressed in same terms as affidavits previously made, 220 *h.*
ready prepared for witness, will be suppressed, 221 *i.*
of a witness dying without having signed them, suppressed, 221 *c.*
suppressed for irregularity, in what cases used, 224 *g*, 225 *a.*
office copy of, want of signature to, and objections to, at the hearing, 226 *a.*
impertinence in, not being scandalous, motion as to, postponed till hearing, 230 *b.*
de bene esse publication and use of, as secondary evidence, 256.
in perpetuam rei memoriam, reading of, on trial at Law, 256 *b.*
in other Courts, order as to reading, 256 *b.*
de bene esse, use of, as secondary evidence, 256 *b.*
objections taken to their use, 256-7.
defective, or irregular use of, as secondary evidence, 257-8.
before a Coroner, 258 *c.*
taken without bill and answer, not available in Chancery, 258 *g.*
in the Court of Council of York, 258 *g.*
use of, on the trial of an issue, proof of proceedings up to examination, 259.
office copy of, how far proof in another proceeding, 259 *a.*
ancient, given in evidence without bill or answer, 259 *d.*
in other suits, by whom and against whom they can be used, 259 *e.*
de bene esse at Law, use of, 262 *c.*
in Ecclesiastical Courts, use of, as secondary evidence, 262 *e.*
certain, made admissible by Act of Parliament, 263.
of deceased relative being read, evidence of declaration by that relative not admissible, 318 *c.*
in suit to perpetuate testimony, not like undersigned declarations, 322-3.
incompetency of witness appearing on the face of, 331 *b.*
by a wife, 344-5.
of witnesses, since become interested, refusal of, at law, 367.
under a Commission, on a reference, 501 *d.*
DEPOSITIONS—*continued.*
in a former suit, readable on a reference without order, 504.
taken before the Masters in their offices, and kept there, 509 *a.*
to be taken and expressed in the first person of the deponent, Order for, 512 *f.*
of a party examined as a party, and not as a witness, like the pleadings, can only be read against himself, 518.
before the Master, of a creditor, or other claimant, preservation of, 519-20.
and Exhibits used, mentioned in the Minute Book of the Registrar, 533 *b.*
mere assertion, voluntary affidavit, or declaration, 540.
to be taken and expressed in the first person of the deponent, 543 *b.*
in another suit; see *Secondary Evidence.*
taken *de bene esse*; see *Interrogatories at Law.*
taken in India; see *India.*
see *Cross-cause, depositions in.*
DERIVATIVE INTERESTS, 464 *a*; see *Assignees, Representatives.*
DESCENT; see *Pedigree, Written Pedigree.*
DESCRIPTION,
admission of, by recital, 462 *b.*
of land, in leases, 311 *a.*
of a person in a will, extrinsic evidence to assist, 283-4.
of person or place, in a written instrument; see *Ambiguity, latent.*
DESIGNATION of Witnesses, what so called, in the Civil Law Courts, 104 *b.*
DESTINATION, false, on questions of, presumptions by the Court of Admiralty, 478 *b.*
DESTRUCTION,
of a deed, &c.,
letting in secondary evidence, 268.
admission of, 269 *d.*
proof of, 268-9.
partial, 276 *a.*
reference, as to, 272 *c.*
see *Bill, Bond, Deed, Document, Will.*
of an instrument by adverse party, letting in less evidence, 273 *b*, 275 *a* and *b.*
of one part of a Will, raises presumption of intention to destroy the counterpart, 478 *d.*
DETENTION of a document, by adverse party or witness, letting in secondary evidence, 268.
by the other party, letting in secondary evidence, 273.
by a witness, letting in secondary evidence, 275 *c.*
of a document; see *Bill, Document.*
DETRIMENT to a witness, yet he may be made to produce a book (at law), 84 *b.*
DEVISES to persons attesting a will, since 1837, void, 183.
DEVISAVIT VEL NON, issue, 184.
issue of, almost of course, 523 *g.*
see *Heir-at-Law, Issue, Will.*

DEVISE; see *Guardianship, Portion, Will.*
DIALECTS provincial, use of, in written instruments, difficulty thereby occasioned, how explained, 280 *d.*
DICTIONARIES, use of, by the Court, to ascertain the meaning of words, 397 *b.*
DIFFERENCES between Nations, proof of, 401 *c*; see *War.*
DIFFICULTIES,
in written documents, 278, *et seq.*
latent, how explained, 214.
patent, defined, their effect, 279.
of a Judge, shifted on to a Jury, 523 *d.*
DIGNITY, claim to,
bill to perpetuate testimony as to, 134-5.
DILIGENCE,
due, used to find a subscribing witness, 176 *a.*
essential, to entitle a party to apply for leave to supply defects, or omissions of proof, 196; see *Mistakes, Search.*
DIRECT; see *Answer.*
DISADVANTAGE of the system adopted, as to examination of witnesses, by Courts of Equity, 469.
DISCHARGE,
as to sums not exceeding 40*s.*, 515 *f.*
of a debt, proof of, doubt as to, 466 *d.*
of an order for a commission, granted on Master's certificate, 509 *e.*
of accounting party by the same document which charges him, 515 *e*; see *Answer, Charge, Discharge, Release.*
DISCLAIMER, when such may become necessary, 478 *f*; see *Advantageous Offer, Documents, Renunciation.*
DISCLAIMING a defendant, plaintiff cannot read his evidence, &c., 506 *b.*
DISCOVERER; see *Scientific Witnesses.*
DISCOVERY,
works on, by V. C. Wigram, and by Mr. Hare, 9 *a.*
right of plaintiff to, 19 *c.*
of facts which can be ascertained by further inquiry, 21 *d.*
books, &c., enforced, although defendant alleges objections thereto, on the part of his partners therein, 24 *d.*
as to matters tending to criminate the defendant, 24 *d.*
of that which would establish a charge against himself, of a criminal nature, 50 *b.*
which would subject defendant to pains or penalties, 81.
and testimony, analogy between, as to compelling, 82.
and a commission, costs of bill for, 112 *a.*
may be refused, and yet a commission to examine witnesses abroad granted, 115-16.
sought in bill to perpetuate testimony, 131.
bill of, filed by defendant to a bill for relief, costs of, order as to, 195 *e.*
of evidence after publication, and after hearing, 196 *b.* 203 *e.*
DISCOVERY—*continued.*
defendant to bill for, cross-examines only, 70 *b.*
defendant to a mere bill of, in aid of an action at law, right of, as to production of documents at the trial, 227 *f.*
of documents, the necessity of properly pleading professional privilege against, 388 *a.*
of deeds; see *Decree enrolled, Deed.*
DISCREDIT, own witness, in Equity, occasion can but seldom occur to, 209 *d.*
at Law, not allowed, *ib.*
of witness; see *Credit.*
DISCRETION, exercised by the Court as to rules of evidence, 6 *a*; see *Accident, Deed, Fraud, Mistake, Trust, &c.*
judicial, delegated to certain officers of the Court, 538 *d*; and see *Masters.*
DISCREPANCIES, in affidavits drawn for, and sworn by, illiterate and ignorant persons, 495 *d.*
in affidavits, 540 *b.*
DISGRACEFUL conduct, witness, when bound to answer as to his own, 85.
DISINTERESTED person becoming interested, evidence given when disinterested, 366.
DISMISSAL of bill, as affecting the admission of depositions in another suit, 261-2.
DISPUTED evidence sometimes improperly allowed to be read, 8.
DISSENTERS, their (so called) Registers, 167 *f.*
DISTRINGAS on stock, affidavits for obtaining, 545 *d.*
DIVERS mesne assignments, use of an allegation or averment of, 244.
DIVORCE a mensâ at thoro, sentence of, in the Spiritual Court, 164 *c.*
DOCUMENTS,
how to be referred to, in the answer of defendant, 19-20.
production of, in the Exchequer, 21 *d.*
setting forth, 24.
production of motion for, 30, *et seq.*
produced in obedience to a *subpœna duces tecum*, 64 *a*; see *Subpœna duces tecum*, 64, n. *a.*
how proved under a commission, and made exhibits, 107 *c.*
sent abroad, with a commission to examine witnesses abroad, 120 *f.*
production of, by a witness, in Scotland or Ireland, 126*-7*.
exhibits, proof of, 146.
public, not records, being exhibits, proof of such, 147.
Parliamentary and Royal, printed copies of, under stat. 8 & 9 Vict. c. 113, 148-9.
irremoveably deposited, how proved by copy, and why, 149 *c.*
official and other, certain, copies of, made evidence by Act of Parliament, 157, 190 *b, c.*

DOCUMENTS—*continued.*
act to facilitate admission of certain official and other, 157; see *Statute.*
public and *quasi* public, inspection, right of, 170.
private, production of, 172 *d.*
proof of, *ib.*
in hands of plaintiff, as to execution and validity, 172-3.
notice to produce, 172-3.
proof of, 173.
custody of, 173 *e.*
effect of proof of, at hearing, 173 *b.*
imperfect, mutilated, or injured, 186 *c.*
proveable, as exhibits, in the Exchequer, without order, 188 *e.*
except as to, memory of witness, being refreshed, not ground for his being examined again, 202 *c.*
admitted, &c., in answer to a mere bill of discovery in aid of an action at law, defendant's right as to production at law, 227 *f.*
destruction of, by adverse party, letting in less evidence, 273 *b*, 275 *a*, and *b.*
in possession of third parties, such parties to be served with a *subpœna*, to produce, 274 *a* and *c.*
original, withholden by adversary, he himself, may not use it in evidence, 275 *a.*
original, loss, destruction or detention to be proved, to let in secondary evidence, 275 *c.*
deposited in Court, order to deliver out, effect of, as to control over, 274 *c.*
being out of the jurisdiction, and so production not enforceable, 274 *c.*
originally defective in point of explicitness, 276; see *Extrinsic Evidence to Explain Deeds, Wills, &c.*
partially destroyed or mutilated, still admissible, 276 *a.*
altered on proof of error, &c., 289.
on the necessity of properly pleading, professional privilege against discovering, 388 *e.*
used at the hearing, proof of, 392 *a.*
effect of reading, at the hearing, 392 *b.*
judicial or official, Judge's signature to, judicial notice of, 413 *k.*
referred to, by an answer, as if appended to it, 429.
annexed to an answer, 429 *b.*
belonging to actions and other proceedings at law, 430, *et seq.*
issue as to, 451 *c*; see *Impeached.*
inspection of, by the Judge, 451; see *Forged, Impeached.*
injured in Court, 452-3.
extracts, copies of originals, facsimiles, or translations, ordered to be sent to the Judge, 464.
presumption of, in support of possession and enjoyment, 485 *b.*

DOCUMENTS—*continued.*
inquiries as to, 490 *a.*
in the possession of one who has disclaimed, inquiry as to, 492 *a.*
production of, by parties, order for, in that for a reference to a Master, 501 *a.*
production and inspection of, on reference, Order as to, 510 *b.*
construction of; see *Written Instrument, Will.*
belonging to Ecclesiastical and other Courts; see *Courts, Enrolment in Chancery.*
judicial, 421, *et seq.*
privileged; see *Production.*
production of, when; see *Stamp.*
see *Custody; Deposit; Destruction; Entries in Books &c. by persons deceased; Exhibit; Exhibits; Inspection of Documents; Instrument; Monastic; Public; State Papers; Offices; Omissions; Records; Revenue; Stamp.*
DOCTOR OF LAWS; see *Advocate.*
DOCUMENTARY EVIDENCE, proof of, hinderance to production of, to let in secondary evidence, 268.
not read or entered as read, costs of, disallowed, 533 *e.*
DONATIO MORTIS CAUSA or *INTER VIVOS*, gift by husband to wife as, for her separate use, evidence as to, 232 *g.*
DOUBT; see *Case sent to a Court of Law, Judge.*
DOWAGERS of peers, privileges of, 65-6 *f.*
DRAFT,
parol evidence of person who prepared, admitted *in odium spoliatoris*, 275 *b.*
(pleadings, &c.) not admissible, although office-copy withholden by the other party, 274.
of deeds, &c., 200 *e*; see *Exhibits, Witnesses.*
use of, as secondary evidence, 271 *b.*
(paper) of depositions to be signed by witness, 106 *d.*
of depositions of witnesses, taken by commissioner on paper, but to be engrossed on parchment, 110 *a.*
sealed up, and how, and why kept, 111 *e.*
DRAWER of a Note, interest rendered him incompetent as a witness, 385 *b.*
DRAWING used as an exhibit, 146 *a.*
DRAYMEN; see *Entries in Books by Servants.*
DRUNK, persons being, declarations by, credibility, not admissibility, of such, thereby affected, 316 *b.*
DRUNKENNESS; see *Inebriety.*
DUBLIN, Records of the Superior Courts of, 160.
DUCHY OF CORNWALL, document produced from the office of, 166 *a*; see *Cornwall, Duchy of.*
DUCES TECUM; see *Subpœna, form of.*
DUES; see *Tonnage Duty.*
DUMB, witness being, 249 *b*; see *Deaf and Dumb.*

DUTY, in execution of, entry in books, by person since deceased, evidence of a fact, 309 *g*.
DYING PERSONS; see *Confessions, Declarations.*

EARWITNESS of privileged communications not restricted from testifying, (he not being privileged,) 384 *f*.
EASEMENT, right to, declarations as to, by occupier, deceased, 309 *b*.
EAST INDIA COMPANY,
books of, when entries in, proveable by copies, 166-7.
books and papers of, right to inspect, 171 *f g*.
Captains of, 122 *h*.
Directors of, communications with the Board of Control, 377 *d*; see *Public*.
EAST INDIES, commission to examine witnesses in, 116 *h* and *i*; see *India*.
ECCLESIASTICAL corporations, aggregate as well as sole, entries in books, &c., by their predecessors, 312 *b*.
Courts, rules in, as to evidence, inquiry as to, by Court of Equity, 4 *a*.
rules in, as to evidence, identical with those in other Courts, 295 *b*.
in general resort to the rule of the Civil Law, 295 *b*.
but also follow those of Equity, 296 *a*.
would inquire what their rule was, *ib*.
practice as to evidence, all put in, 212.
custom in, as to impoundment of vouchers, 195.
examination of witnesses *vivâ voce* in open Court, 194 *a*.
as to evidence in, of insanity, &c., 233 *b*; see *Insanity, Impotency, Medical.*
no presumption in, as to survivorship, 488 *a*.
examination in, of witnesses, *de bene esse*, 124 *g*.
practice of, as to publication of depositions taken *de bene esse*, 143 *c*.
evidence taken after publication looked at with great caution, 141 *a*.
more deferred to by Courts of Equity than by Courts of Law, 441.
answer in, read against the party in a Court of Equity, 442 *a*.
attesting witnesses, in cases pregnant with fraud, credit of, 472 *a*.
credibility of witnesses, cases in, as to, 472 *a*.
depositions in, use of, as secondary evidence, 262 *c*.
designation (so called) of witnesses in, 67 *c*.
examiner in, remarks on duties of, 72 *d*.
jurisdiction of, as to proof of an instrument, of a testamentary form executed by a feme covert, ousted, 178 *e*.
jurisdiction and sentences of,
as to wills and administrations, 442, *et seq*.
medical evidence in, 570 *a*.
officer of, to produce original will, 178 *d*.
proof in, of exhibits, 191 *d*.
ECCLESIASTICAL COURTS — *continued.*
proof in, of the handwriting of a witness in an enemy's country, 265 *a*.
seals of, 154 *b*.
copies of wills and letters of administration, *ib*.
seal of, in proof of will of personalty, or of letters of administration, 414 *a*.
evidence in, admission of, secondary, 248 *a*.
sentences of, respecting marriage, 440, *et seq*.
sentences of, respecting wills and administrations, 442, *et seq*.
where no book kept, what is evidence of title of the executor, 414 *g*.
inquiry as to character, and impeachment of credit of witness in, 204 *c*.
witnesses examined secretly in, 74 *c*.
witness in, not examined *vivâ voce*, 191 *d*.
see *Examiner; Fornication; Jactitation of Marriage; Marriage; Publication, Examination after; Vivâ voce.*
ECCLESIASTICAL PERSONS, in leases by, recitals of former leases, 462 *b*.
EDINBURGH, Registers of Episcopal Churches at, 167 *f*.
EFFECT, "to that effect" words; see *Affidavit of Words spoken.*
of judicial documents, 421, *et seq*.
of records; see *Records, Force of, and Credit due to.*
EI INCUMBIT PROBATIO QUI DICIT, NON EI QUI NEGAT, 388 *b*.
EJECTMENT, action of, verdict in, effect of, 433.
presumptions in, as to terms, 176-7; see *Landlord, Lessor, Tenant.*
ELDON, Lord C., his observations, as to a Court of Equity sending matters in Equity, for the decision of a Court of Law, 530 *b*.
ENCROACHMENTS ON HIGHWAYS, certificates by justices, 254 *c*.
ENDORSEMENT on a commission as to the execution, 110.
on an exhibit, 107-8; see *Bill of Exchange.*
ENDOWMENT deeds, proof of, 186 *f*.
charter or deed of, or *inspeximus* of such, should come out of proper custody, to be available, 313 *c*.
ENEMY,
territories of, witnesses being in, commission granted to examine, 116 *f*.
country of, witness being in, proof of handwriting, 265 *a*.
ENGINEER; see *Scientific Witnesses.*
ENGLAND; see *Bank of.*
ENGLISHMAN, right of, to trial by jury, as to his credibility, 5 *b*.
ENGLISH, translation of depositions into, 119 *a*; see *Interpreter, Notary.*
ENGRAVER, witness as to minute lines on paper, 267 *c*.

ENGRAVINGS, copyright as to, piracy of, 454; and see *Music*.
ENGROSSMENT of depositions on parchment, 109-10 *a*; see *Depositions, Drafts, Parchment*.
ENLARGING PUBLICATION,
practice as to, 137.
special application as to, *ib*.
application for, to the Master, 137.
or on appeal to the Court, *ib*.
grounds for, 138.
application for, after time expired, 137 *f*, 138 *b*.
as to costs of, 138.
after publication passed, 140.
affidavit, 138-9 *a*.
ENROLLED, power of attorney, in Jamaica, proved by copy, and why, 149 *c*.
ENROLMENT,
of a bargain and sale, non-presumption of, 481.
in Chancery, clerk of, 541 *e*.
of Decree for tithes in London, secondary evidence of, 165 *e*.
of Decrees disused, 422 *a*.
of Deeds, for safe custody, does not make them records, 416.
advantages of, 417 *b*.
under Act of Parliament looked upon as records, 417 *c*.
under stat. 9 Geo. 2, c. 36, what sufficient proof of, 417 *c*.
injured in Court, 453 *a*.
or document in Chancery, acknowledgments, affidavits, or affirmations for the purpose of, 541 *e*.
of Recognizances, order, as to, 416 *e*.
evidence of, 419; see *Statutes*.
ENTER the evidence put in and read, or agreed to be so considered, duty of registrar to, 533.
ENTERED as read, affidavits filed in Bankruptcy; see *Bankruptcy*.
ENTERING of evidence in the registrar's book, 212 *b*.
of evidence; see *Decree by Consent, and on Non-appearing of Defendant*.
ENTRIES,
in books, &c., by agents, bailiffs, clerks, collectors (receivers), or stewards, 310 *b*.
by rectors, vicars, &c., 311 *f*.
by shopmen, servants, 313.
by persons deceased, particulars necessary to be proved, 313.
written or signed by bankrupt before bankruptcy, use of, by assignees, 310 *a*.
of a company as evidence of acts by the company admissible, 304 *d*.
of universities and colleges, admissible evidence, 304 *d*.
by one deceased, in his own favour, not evidence, 310 *b*, *ad finem*, 311 *d* & *e*.
merely by way of memorandum, not available, 310 *b*.
ENTRIES IN BOOKS, &c.—*continued*.
by landlord himself, not available, 311 *c*, *d*, and *e*.
by person deceased, 309 *a*.
cases as to, already gone far enough, 310 *b*, *ad finem*.
by persons since deceased, evidence of, admissible, although the facts provable by persons living, 314 *e*; see *Books, Declarations, Entry, Hearsay, Solicitors*.
the whole to be read, 309 *a*.
evidence of the whole transaction, 309 *g*; see *Copyhold, Parish Books, Register, Steward, Vestry*.
by person abroad, not as if by person deceased, 314 *e*.
EQUITABLE
assistance, refused to him who has not acted equitably, 290.
interest, construction of, opinion upon; Court of Law objects to give, 531 *i*.
jurisdiction of the Court of Chancery, 431 *b*.
mortgage may be established by aid of parol evidence, 277 *a*.
as may subsequent advances, *ib*.
deposit by way of, in case of a policy, onus of proving notice, 389 *a*.
EQUITY AS TO EVIDENCE,
Courts of, follow the rules of the Courts of Common Law, 3-4.
when not bound by strict rules as to evidence, 6.
the duty of, to weigh the credit of each witness, or other means of evidence, 472 *a*.
want of oral examination of witnesses in, 496, *et seq*.
other Courts of, decrees in, 425; see *Court of Exchequer, Rule of Chancery*.
Judge to declare himself unable to expound the law, unsatisfactory, 530; see *Eldon, Ld. Ch., his Observations*.
and Law, discrepancies between practice in, as to reading the depositions of witnesses living, but become interested, 367 *a*.
suits in, documents belonging to, 421, *et seq*.
ERASURE, detection of, by use of microscope or magnifying glass, 267 *b*.
in a deed, 452.
in a will (since 1837), 452 *d*.
ERROR of solicitor, costs occasioned by, 222 *a*.
of examiners, commissioners, witnesses, solicitors, or counsel, defects of proof caused by, how supplied, 197-8-9.
or omission, in agreements, deeds (and other written instruments), evidence to rectify, 289.
in enrolments corrected, 410 *c*.
in title of interrogatories, how rectified, 223 *a*.
Se *Mistakes*.

ESTABLISHING OF A WILL, 179, 181
184 *d*; see *Will.*
though lost, by a copy, 186 *c.*
ESTOPPEL, admissions arising by way of, 461 *b*; see *Admissions, Presumptions.*
EVASION by a witness, difficulty of preventing, 56.
EVIDENCE,
costs of advising with counsel as to, allowed, between party and party, 52 *c.*
minute of, expected to be given, furnished to examiner, by solicitor, 67.
called a "designation," furnished to examiner, by proctor, 67 *c.*
adduced; see *New Trial.*
in cross cause; see *Cross Cause; Depositions.*
in danger of being lost, 121.
entered, but not actually read, consequences, how the mistake rectified, 534-5.
fairly before the Judge; see *New Trial.*
kept back; see *New Trial.*
relevancy of, test of; see *Decree, Materiality, Variance.*
not read or put in, not received by the Court, 212.
exclusion of, 212, *et seq.*
to meet a case not opened, cannot be read, 212 *b.*
used by the Court, at the hearing, general observations as to, 393-4.
used at the hearing, may also be used before the Master, 503 *e.*
on a reference, 503-4.
which cannot be used at the hearing, must not be entered, 533 *c.*
that which was not, the L. K. would not take upon himself to make such, 366 *e*; see *Proof, Sufficiency, Testimony, Witness.*
in the Court of Admiralty, 258 *g.*
in the Court of Bankruptcy, remedy when improperly made, 263 *d.*
using of, 437 *c*; see *Bankrupt, Admissions by; Bankruptcy, Proceedings in.*
of creditor, or other person coming in to claim before the Master, 519-20.
de bene esse, when unavailable, 143.
at Law, 257 *f.*
use of, in Equity, *ib. g.*
of one *pro interesse suo*,
mode of proceeding on, 519.
reference to the Master on, &c., 519.
vivâ voce, by the Court, 53.
as to the power and its exercise, *ib.*
subpœna to testify *vivâ voce*, in Court, *ib. d.*
by the Court *viva voce*, 493, *et seq.*
to clear doubts and enforce the conscience of the Court, 496 *a.*
ad informandum conscientiam judicis, 144 *b.*
of a party, generally, 12 *b.*
OF A PARTY BEFORE THE MASTER, 506 *b.*
for the benefit of all parties, 516-7.
EXAMINATION OF A PARTY BEFORE THE MASTER—*continued.*
his own inquiry, and he may make what use of it he pleases, 516 *c.*
all parties entitled to take copies of, 516 *d.*
may be at several times, 517 *d.*
same as an answer, 518.
not replied to, concludes other parties, 520.
course to avoid being concluded by, 520; see *Defendant, Falsify.*
supplemental, to correct a mistake, 518 *c.*
EXAMINATION
of a party, 12.
of a plaintiff, suggestions as to, 12 *b.*
of a defendant; see *Commission to take.*
of persons on the trial of an issue directed, 525 *d.*
found insufficient, 210 *a*; see *Insufficiency, Impertinence, Scandal.*
upon interrogatories (at Law), when unavailable, 143 *c.*
with original, of an office copy of a bill, not sufficient at law, 150 *f*; see *Answer, reading part of, Coroners, Justices, Magistrates.*
being concluded and known, no further examination allowed, 513 *d.*
insufficient, 210 *a*, 520-1.
See *Insufficiency, Impertinency, Scandal.*
OF A WITNESS, at Law, compared with that in Equity, 13, 14.
precludes further amendment of bill, 28.
must be carried on in private, 220 *d.*
"in Court," term applied to an examination by the Examiner, 53 *a.*
by Examiners, 61.
why preferred by the Court, 62 *c.*
by Commissioner, on oath, &c., 98.
by written interrogatories,
Lord Erskine's remark upon, 56.
practical inconveniences, 56 *b.*
disadvantage, 72 *et seq.*
little better than affidavit, 75.
not examined, 70 *a.*
again, one already examined, on the same matters, 70 *a.*
but on new matters, 70 *a.*
by order, but not on the same points, 201.
by way of further examination, not re-examination, order for, 201.
whether further examination or re-examination, in certain cases, when and why admitted, 202 *a.*
after publication passed, 140, 141 *a.*
in special cases, to supply defects or omissions of proof, 196 *b.*
allowed in a proper case, 197 *g*; see *Errors.*
instances of, old cases, 203 *e.*
as to credit only, 207 8.
further, after publication passed, 501 *d.*
to prove exhibits, 188.

EXAMINATION OF A WITNESS—*continued.*
again, as to custody of a document, 189 *h.*
as to handwriting, *ib.*
to prove the official character of the writer of an entry, &c., 189 *h.*
to prove an exhibit *vivâ voce*, at the hearing, by the Court, 191.
second, 193.
may be to prove, or if having only proved exhibits, *ib.*
EXAMINATIONS,
before a Master, on a reference, 502.
on a state of facts, 504 *e.*
before the Master, being concluded and known, no further examination allowed, 513 *d.*
insufficiency of, allegation of, 520-21; see *De bene esse, Private Room.*
vivâ voce; see *Ward of Court.*
or depositions of witnesses, taken before commissioners, oaths as to carriage of, 110 *f.*; see *Commission, Cross-examination of Witnesses*, 70.
to credit of a witness, 204, *et seq.*
sparingly to be granted, 205.
when, 208.
irregularity in taking, 213 *c.*
rules for suppressing, for irregularity in taking, 219, *et seq.*
though read as charge, not readable as discharge, 468 *a.*
returned to interrogatories settled by the Master, usually, though not essentially, signed by counsel, 520.
EXAMINE, leave to, after seeing the depositions, 140-41.
application for time to, affidavit, &c., 545 *d.*
EXAMINED COPIES,
of Records, 159.
how prepared, *ib. e.*
when evidence, 149.
not (mere) secondary evidence, 149.
certain, printed copies, of certain documents, a class of, 149.
not proveable, as exhibits, at the hearing, in proving, cross-examination may be necessary, 190.
EXAMINERS,
origin of their office, 52-3.
to examine all witnesses within twenty miles of London, Orders as to this, 62 *c.*
exclusive right to act in London, 219 *g.*
application to bring witnesses before, 536 *h*; see *New Evidence on Rehearing.*
sworn officers of the Court, 62 *c.*
two in number, 63.
appointed by, and deputies of the M.R., *ib.*
origin and nature of their office, *ib.*
in the Court of Exchequer, *ib.*
in Chancery, duties of, as stated by Mr. Plumer, 63 *e.*
(Mr. Plumer and Mr. Dancer) their opinions and suggestions, 72, *et seq.*
EXAMINERS—*continued.*
filing interrogatories with, 63, and *g.*
authorised to administer oaths and take affirmations, 65 *d.*
instructions to, by solicitor in Chancery, 67.
at one time examined out of town, 62 *d.*
under certain circumstances, still may, *ib.*
ordered to attend a witness unable to travel, 67 *a.*
not to allow a third person to be present, and refresh the memory of a witness, aged and infirm, 67 *e.*
how to proceed in examination of witnesses, 67-8, 68 *a.*
and their clerks, orders of Lord Clarendon, C., as to, 68 *a, b.*
depositions remain with, 71.
their discretion limited, 76.
suggestions as to its extension, 76-7.
witnesses examined by, although a commission had been sued out, 77 *a.*
in former times went or sent their clerks into the country, 89 *a.*
errors of, cases of, defect supplied, 197-8-9.
regularly to examine such witnesses as the Master thought necessary, 508.
Office, as to mode of conducting business in, 68 *a, b.* 71 *c, d.*
fees at, 72 *b.*
Clerk, 68 *a, b*, notice to, necessity of, 220 *b.*
sworn clerk to, interrogatories lodged with, 63.
in Ecclesiastical Court, 67 *c*, having, from misconstruction of the plea, rejected evidence, suggestion of, 194 *a.*
EXAMINING Witnesses, for the satisfaction of the Court, 489.
EXCEPTIONS,
to an answer, grounds of, 19.
for insufficiency, 25, *et seq.*
for scandal or other impertinence, or insufficiency, filing of, 215 *h.*
or articles to discredit a witness, certificate of having filed, 205.
notice and copy, *b.*; see *Articles to discredit Witness.*
to certificate of the sufficiency of an examination before the Master, 521.
to Master's report as to scandal, &c., 217.
all defendants may argue, from evidence produced by one, 517 *c.*
any of the defendants may take, 517 *c.*
new report, 521; see *Report, Review.*
as to interrogatories settled by the Master, 520.
EXCEPTANT'S deposit; see *Deposit.*
EXCHEQUER, Court of, Equity side of, 1 *a.*
abolished, 81 *f.*
strictness of, as to rules of evidence, in cases of attorney against his client, 6 *a.*
examination of witnesses in, called an examination before a baron, 72 *d.*
cross-examination in, 61 *d.*
witness in, objecting to an interrogatory, 78 *g.*

EXCHEQUER, Court of,—*continued.*
injunction by, prevented party obtaining, in Chancery, commission, &c., 115 *g.*
issues sent from, to the common law side, 524 *b.*
judgment *in rem.* in, 435.
order to take an account in, 514.
matters of account in, not proved at the hearing, 240 *c.*
practice in, as to exceptions to answer, for insufficiency, 21 *d.*
practice in, as to a witness not attending to be examined, 102 *b.*
seal of, 413 *b.* 218; see *Costs of Impertinence, Demurrer to Interrogatories.*
receipt of, record in, 166; see *Remembrancer, Revenue.*
EXCISE, Commissioners of, judgment by 435.
Office, books of, inspection of, 172 *a.*
EXCLUSION of Evidence, 212.
EXCOMMUNICATION, certificate of Ordinary to prove, 253 *f.*
effect of, absolution from, 334 *a.*
EXCULPATION, of the behaviour of the witness himself, being necessary, affects his credit, 472 *a.*
EXECUTION; see *Commission, proceedings under; Deeds, Documents, Fraud, Powers, Wills.*
OF AN AWARD, proof of, 126.
OF A DEED, &c., cross-examination as to, 71 *a.*
exhibits, proof of, 146.
not admitted by admission of copies, 146 *c.*
recited in a deed, 462 *b.*
by a person found by inquisition to have been of unsound mind, as to validity of, 524 *a.*
lost, proof of, 272 *d.*
circumstances attending, proof of may be by parol, 276-7 *a.*
OF A WILL, admission of, by a recital, 462 *b.*
since 1837, 182.
EXECUTOR,
accounting, could not examine his co-executor, as a witness, 515 *h.*
admissions by, sufficiency of, 460.
which bind, as representing the testator, 463 *g.*
answer of, read at law, as evidence, effect of, 6, 7.
competency of, 357.
always a competent witness to prove a will as to realty only, 361 *c.*
examination of a party being, 340 *h.*
examination of, ought to contain an interrogatory whether he is indebted to the testator, 516 *b.*
declarations by, before becoming so, 313 *d.*
declarations of testators, evidence of, available against, 313 *d.*; see *Examination of Parties before the Master.*
defendant's, examination of a mistake in; see *Supplemental Examination.*
EXECUTOR—*continued.*
promises by, preventing a bequest, parol evidence to shew and enforce, 293 *b.*
title of, to residue of personal estates, of testator's dying before the 1st of September, 1838, 294 *c.*
of a will, since 1837, not an incompetent witness to it, 184.
in trust, party being (was) not examinable, 340 *b*; see *Creditor not restrained from suing, Default, wilful, Mere trustee.*
EXECUTRIX, wife suing as, husband incompetent, 343 *b.*
EXEMPLIFICATION,
an Order as to, 410 *c.*
sent from certain Courts, received, on inspection of their seals, 410 *e.*
of better credit than sworn copy, and why, 410 *c.*
evidence, although the record itself lost, 410 *d.*
under the great seal, 410-11.
order as to, what to contain, 415 *d.*
ought to be only of that which is of record, 416 *f.*
of Depositions, 160 *c.*
refused, 111 *e.*
of such in a suit to perpetuate testimony, 133.
of Letters Patent, 415.
of Records, 153 *c.*
(so called), of the Ecclesiastical Courts, 154 *b.*
of Sentence of a Court in Holland, 447 *d.*
of Will, when original lost, 414 *g.*
EXHIBITING, interrogatories; see *Interrogatories.*
EXHIBITS,
what may be such, 146 *a.*
proof of such, 146 *d.*
proof of such in the Exchequer;
when a party an infant, 51 *c.*
when a party a married woman, *ib.*
proof of, in Ireland, 186 *d.*
further interrogatories, leave to file, authorizes examination of witness already examined, but as to other matters, 70 *a.*
document, &c., referred to in the depositions, signed by the Examiner, 72.
produced in obedience to a *Subpœna duces tecum*, 64 *a.*
books, &c., how proved under a commission, 107 *c.*
indorsement on, 107-8.
how proved in suits, on motions or petitions, 172 *f.*
proof of, at the hearing, *vivâ voce*, or by affidavit, 188, *et seq.*
Order as to, 188 *b.*
mode of proving at the hearing, 191-2.
use of, or not, optional, 192 *b.*
proved *vivâ voce* (or by affidavit) at the hearing, only upon the application of the party who is to use them, 191 *c.*

EXHIBITS—*continued.*
production and inspection of, by the other party, 192.
deposit of, with officer of the Court, 192.
not proved at the hearing, leave given to read at a rehearing, 199 *a*.
not having been inspected by witness, previously to examination, ground for allowing a re-examination, 200 *c*.
formal proof of, *vivâ voce*, 493 *c*.
old method of proving at the hearing, 493 *c*.
no Will could be proved, as such, in Court, *vivâ voce*, either in the Exchequer or Chancery, 493 *c*.
mentioned in a decree, 533 *b*.
application to be allowed to prove, 536 *g*; see *New Evidence on Rehearing*.
affidavits to prove, Order as to, 538 *a*.
tampered with, 193 *a*.
or forged, 193 *b*
in a foreign language, proof of correctness of translation, 189 *i*.
see *Deeds, Documents, Inspection, Production, Proof; Subpœna, with clause duces tecum; User*.
EX PARTE commission to examine abroad, when may issue, 118 *d*.
order for examination of a witness, *de bene esse*, 121 *g* and *h*.
de bene esse, 123 *b*, 124 *e*, *f* and *g*.
materna, and *ex parte paterna*; see *Heir-at-Law, Inquiries*.
EXPENSE of an inquiry induces the Court not unfrequently to rest satisfied with what seems insufficient evidence, 499 *a*.
of witness served with a *subpœna* to testify *vivâ voce* at the hearing, 191 *g*.
of witness examined in Scotland or Ireland 177,*; see *Conduct-money*.
EXPULSION; see *Universities, books of*.
EXPUNGING leading interrogatories, 213 *a*.
scandal, or other impertinence, new practice as to, 215 *et seq*.
process of (new practice) 217.
fees, payment of, on, *ib*.
old practice as to, 215 *b*.
EXTENT of Crown lands, 165 *g*.
use of, in evidence, 166 *a*.
EXTRINSIC Evidence, admitted to explain a recital, 271 *c*.
to explain a will, admissibility of, early cases as to, 282 *c*.
to add to or vary a written instrument, as to the consideration and date, 287-8.
not admitted on question of legacies being accumulative or substitutional, or where a presumption arises, 297 *b*. See *Parol Evidence to explain*.

FACT,
issue of, 523, *et seq*.
matter of, admitted or agreed to before the Master, Order as to, 505 *h*.
presumption of, 483-4.

FACT—*continued.*
a state of; see *State of Facts, Counter Statement*.
substantive extrinsic, evidence of, need not be put in issue, 230 *a*.
proved in the cause, conclusions drawn by persons of skill, evidence of, 470 *a*.
not in the pleadings, or not in issue, put into a train of investigation by the Court, 491 *c*; see *Admissions, Matters in issue*.
FAMILY,
Bibles, Prayer and other such Books, 316 *e*, 319 *e*.
heads of, solemn declarations by, on questions of pedigree, 314 *i*.
mansion, pedigree hung up in, 319 *c*.
memorials, inscriptions on tombs, rings, brooches, &c., 316 *f*.
solicitor, witness as to handwriting, 267 *b*.
traditions, 316.
see *Bible, Child, Declarations, Genealogy, Hearsay, Husband, Illegitimate, Issue, Pedigree, Relations, Tomb, Written Pedigree*.
FALSE allegations in a bill, necessity and use of, 427.
declaration, under the statute, a misdemeanor, 461.
return, Commissioners making such, 109 *f*; see *Instrument, shewn to be*.
FALSIFY an examination of a party, a commission for the examination of witnesses to, 509 *e*.
an examination before the Master, interrogatories to, motion for, is of course, and when necessary to avoid being precluded, 520.
Report, affidavit at least necessary, 506.
statement of defendant made on interrogatories, leave to, refused, 209 *e*.
FATHER; see *Bastard, Filiation, Relative*.
FEES to Commissioners, payment of, 111-112 *a*.
of persons acting as Masters extraordinary in Scotland or Ireland, 543; see *Attorney, bill of, Commissioner*.
FEIGNED ISSUE, nature of, 525; see *Issue*.
FELONIES, Acts creating, 408.
conviction of, 433 *d*; see *Criminal Matters*.
FEME COVERT, answer of, 28.
non user of, against her, 428 *d*.
see *Acknowledgment of a deed by*.
appointment of, by a testamentary instrument, how to be proved, 178 *e*.
examination of, apart from *baron*, 494 *f*.
heiress, admission of will by, 180 *a*; see *Husband and Wife*.
instrument in the nature of a will by, 182.
FERRY, right of, evidence of reputation as to, 305 *e*.
FIAT IN BANKRUPTCY, date of, *primâ facie* evidence of the time of its issuing, 436 *e*.

FIATS, petitions to supersede or annul, rehearing of, not on new evidence, 573 *c*; see *Bankruptcy, proceedings in.*
FICTITIOUS matter in a bill, 427.
FIGURES in an examination, abuse as to, 245; see *Prolixity.*
FILIATION of a bastard, proof of, 5 *b*.
FILING affidavits used in the Master's office, 512 *f*.
and registering of affidavits, 543-4 *a*.
of affidavit, office copy only evidence of, 544 *a*.
interrogatories, what is so called, 63.
for witnesses in London, 63 *g*.
pending an examination in Court, 70 *a*.
cross-interrogatories, to cross-examine in Court, 71 *a*.
interrogatories; see *Interrogatories.*
FINDING OF MASTER, when he will Report that "he cannot find, &c." 511 *a*; see *Heir, Master, Report.*
FINE
imposed on a Commissioner for making a false return, 109 *b*.
evidence of the levying of, 155 *d*.
search for, as to, 169 *d*.
with proclamation, and five years of non claim, presumption raised by, 476.
chirograph evidence of, but not of proclamations, 155 *d*.
and Recovery, in Wales, enrolment of, exemplification of, 413 *d*.
FINES AND RECOVERIES ACTS, 480 *c*.
FIRE, bill and answer destroyed by, 163 *d*.
judgment destroyed by, 165 *f*.
loss of deeds by, 267 *c*.
which had destroyed public documents, 269 *e*.
at Six Clerks Office, 453 *b*.
FISHING, licenses for, use of, 311 *b*.
FLEET PRISON, marriages in, book of, not a register, 168 *b*.
FOREIGN
Country, a witness being in, handwriting proved, without sending out a commission, 264 *e*.
Courts, sentences of, are to be held conclusive, 446.
but some such disregarded, 446; see *Admiralty, Courts, Foreign;* and see *Courts of competent jurisdiction.*
Governments, recognition of, by ours, 399, 400.
Law to be proved as a fact, and how, 447.
lawyers, testimony of, as to foreign law, *ib.*
opinions of, 448 *a*.
parts, commission to examine in, to discredit a witness, not allowed, to delay, 208; see *Abroad.*
sentences, as to prizes, 445 *f*; see *Admiralty, Judgment, Sentence.*
FOREIGNERS, swearing of, 332; see *Jews, Turks, Infidels, and Heretics.*
examination of, under a commission, 104 *e*.
how such to be examined, 68 *c*.
witnesses examined abroad, 119.
FORFEITURE, case of, office copy of bill not proof, to work, 259 *a*.
when answer might subject a witness to, 84 *d*.
FORGED, exhibits, tendered in evidence, proved to be, Court will not allow the party to go into any other evidence, 193 *b*.
FORGERY
of an alleged probate, may be proved, 444 *d*.
of a bank note, prosecution for, 264 *e*.
detection of, by use of a microscope, or a magnifying glass, 267 *b*.
of a will of a person still living, 442 *c*.
of a probate of a will, 443.
of a will, probate of, 443.
use of, consequences of, 245-6.
of an instrument, proof of, 246 *a*.
of part of a will, course the executors should take, as to probate, 444 *a*; see *Impeached Document, Instrument, Invalidate.*
FORMS OF AFFIDAVITS, 513; see *Affidavits.*
FORMS OF INTERROGATORIES; see Appendix.
FORMS OF ORDERS; see *Orders.*
FORMA PAUPERIS,
one having been examined *pro interesse suo*, permitted to sue in, 519 *c*.; see *Perjury.*
FORMALITIES of a deed, readily presumed, 482.
FORMER suit, evidence in, used as secondary evidence, 258 *g*.
FORNICATION, sentence of guilty of, in Spiritual Court, 442 *b*.
sentence in suit for, in a criminal way, 442 *b*.
FOUNDER OF A COLLEGE, who was, not proveable by history, 398 *f*.
FOUR-DAY-ORDER for production of deeds, 510 *b*.
FRANKS, INSPECTOR OF, witness as to handwriting of an M.P., 265-6.
evidence of, as to handwriting, rejected, 267 *b*.
FRAUD,
cases of, rules as to evidence relaxed in, 6.
heir kept out of the way, 122 *f*.
provision against, in giving leave to examine after publication passed, 140-1.
inducing relaxation of rules, 140 *b*.
deed not impeached for, proveable by affidavit, 188 *e*.
in procuring (the execution of) a deed, proveable by parol evidence, 277 *a*; see *Deed, Evidence, Execution.*
proof of, an inducement to the Court to admit parol evidence to affect or supply the defects in written instruments, 277 *a*.
imputations of, against a deed, met by extrinsic evidence, 284 *c*.
effect of, to cause exceptions to rules, 288.
relaxation of rules in cases of, 328 *a*.
in cases pregnant with, as to the credit of witnesses, 427 *a*.

FRAUD—*continued.*
and imposition as to a will touching personal estate, jurisdiction as to, 444 *a*.
or not, is a conclusion from facts, confession is no fact, but evidence of it, 474 *e*.
alleged, the parties to be examined, 506 *b*.
examination of defendant, to sift out, *ib*.
new trial, ground for, 528 *d*.
see *Attorney who drew the will; Deed, construction and execution of; Exhibits, tampered with or forged.*
and Imposition; see *Character, Instrument, Invalidate, Special Cases, Will.*
as to a will of personalty; see *Ecclesiastical Court, Juridiction of.*
FRAUDS, Statute of, effect of pleading, as to admissions, 22 *d*.
use of, 406.
FREEHOLDER; see *Declaration by.*
FREE WARREN, claim of, over a whole Manor, by prescription, evidence of reputation as to, 307 *a*.
FRIENDS, to give evidence, although in breach of confidence, 381 *e*.
FULL PROOF, to be made before publication passes, Order as to, 501 *d*.
FUNDS; see *Bank of England, Stock, Transfer.*
FURTHER
directions, on hearing; for the Court will not receive evidence of a fact not included in the finding, 522 *b*.
evidence, leave given, on motion, at the hearing, to enter into, 198 *m*; see *Further Examination, Re-examination.*
to prove a will, when only one witness had been examined by the Examiner, in the Exchequer, 199 *g*; see *Death, Deed, Sanity, Testator.*
examination of witnesses, in a suit to perpetuate testimony, 197 *d*.
before the Master, not without Order, interrogatories to be settled by the Master, 201.
or re-examination of witnesses, *ubi judex dubitat*, &c., seems practically obsolete, 496 *a*.
and inquiries before the Master, origin and growth of the practice as to, 501 *d*.
of a witness already examined, Order for, Motion for, 507, *et notis.*
see *Examination.*
information, where the Court requires, 489, *et seq.*

GAZETTE; see *Advertisements.*
purporting to be printed by H. M. printer, admitted, 400 *m*.
reference to, as to war, and as to acts of government, 400 *d*.
by statutes, in certain cases, made evidence, 400 *h*.
See *Bankrupt.*
GENEALOGICAL narrative, in the handwriting of a person and relating to his own family, 318 *c*; see *Written Pedigree.*
GENEALOGY; see *Pedigree, Relationship.*
GENTOO witness, how sworn, 65-6 *f*, 333 *a*.
GENUINENESS, of an indictment, circumstances to show, 186 *f*.
of a document, necessity of proof of, prior to secondary evidence of its contents, 272.
of a document withholden by an adverse party, need not be proved, 274 *c*.
GERMANY, commission to examine witnesses in, 117 *h*.
GHENT, suit in a Court at, commission to examine witnesses in England in, 118 *f*.
GIFTS; see *Advances.*
GOLDSMITH'S account, read as charge, readable as discharge, 468.
GOODS, delivery of, proof of, by entries in books, by servants deceased, 313 *e*, *f*, and *g*.
seized, property in, declarations by debtors, as to, 313 *d*.
GOVERNMENT, Acts of, documents of reference, as to, 397.
of a country, knowledge of, whether recognised by ours, 399 *e*.
officers, public policy precluding testimony of such, 86.
GRADUATING; see *Universities, Books of.*
GRAMMATICAL nicety, in construing a will, 285 *d*.
GRAND JURY, one of such called to prove what not in his oath as such, 86 *f*.
GRANT, presumption of, 484.
for the purpose, and upon the principle, of quieting the possession, 484 *b*; see *Crown, Peerage.*
GRANTEE of a lease, bound by admissions of the grantor, 464 *b*.
GRANTOR of a lease, admissions by, binding the grantee, 464 *a*.
GREAT SEAL; see *Exemplification under, Scotland.*
GRENADA, Island of, Court of, seal of, requires to be proved, 154 *f*.
GUARDIAN, answer of an infant by, use of, 428.
(*quasi*), answer of a superannuated person put in by, use of, 428 *d*.
of an infant, answer of, 10 *b*.
of one not an infant, 10 *b*.
of a plaintiff examined, *de bene esse*, 339 *d*.
see *Concealed Person, Ward of Court.*
GUARDIANSHIP of infants, under the statute, parol evidence as to, in general inadmissible, 277 *a*.
GUERNSEY, baptisms in, register of, 168 *c*.
GUIDING the hand of a marksman, 186 *c*.
See *Marks, Marksman.*
GUILTY, plea of, evidence against the prisoner, as an admission, 433 *d*.

HABITS of a testator, extrinsic evidence as to, in order to explain a misnomer, 283-4.
HÆC VERBA, deeds required to be set forth in, 24 *d*.

HAMBURGH, affidavit made at, 542 *c*.
HANDWRITING, proof of, as secondary evidence, to prove letters, accounts, &c., 186 *e*; see *Guiding the Hand of, and Will attested by a, Marksman*, 186 *c*.
of attesting witnesses alleged to be deceased, not proveable *vivâ voce*, 189 *e*.
proof of, to a letter, &c., 189 *d*.
in a book, in the museum, antiquity of liberty to prove, after publication, 203 *e*.
of a witness to a will, proved, yet no evidence, unless his death be proved, 261 *d*.
inferences from, proof of, 263.
secondary evidnce of, 263.
of attesting witness abroad, dead, or incompetent, proof of, 263 *c*.
slight proof of, admitted, 264.
proof of, in the Ecclesiastical Court, witness in an enemy's country, 265 *a*.
proof of, what sufficient, 265.
belief of witness, as to, *ib*.
evidence of, to go before a jury, 266 *g*.
mere opinion as to, or comparison of, 266-7.
proof of, by family solicitor, 267 *b*.
comparison of, by a jury, 267 *b*.
tested, by collation with the signature of a will, 267 *b*.
by observation, as to peculiarities, 266 *c* and *d*, 267 *b*.
of subscribing witness, effect of, after thirty years, 482.
see *Franks, Genealogical Narrative, Inspector, Marks, Written Pedigree*.
HANOVER, King of (being also a Peer of this Realm, Duke of Cumberland, &c.), answers a cross bill on his oath, 65 *f*.
HARDWICKE, Ld. C., eulogy on, by Eldon, Ld. C., 403.
HEADING of interrogatories, form of, 59.
HEALTH, precarious state of, ground for examination of a witness *de bene esse*, 121 *b*.
HEARING,
adjournment of, in order to have defects or omissions of proof supplied, in special cases of mistake, &c., 197-8-9.
on bill and answer, Order as to, 239 *c*.
the cause set down for, 145 *h*.
of cause, not deferred until Master's report under an order for taking preliminary accounts, &c., 490 *a*.
clerk in Court's attendance at, with the record, 151 *d*.
documents used at, as to the proof of, 392 *a*.
further evidence at, as to a point not proved in the cause, but raised by the Court, 203 *e*.
effect of reading a document at, 392 *f*.
matters of account not proveable at, 240 *c*.
the object of the evidence being a decree, 240.
none, in general, of a bill to perpetuate testimony, 132.
not on the same term as publication, unless by consent, or by special orders, 139 *c*.
HEARING—*continued*.
objections at, in general the same as grounds for expunging or suppressing, 225.
suit to perpetuate testimony, cause not brought to, 133-4.
use of depositions and evidence at; see *Another Cause, Cross-cause, Depositions*.
what proveable at; see *Exhibit*.
what not; see *Deed, Will*.
within a week of, leave to examine to discredit a witness refused, 208 *b*.
See *Bill and Answer, Cause standing over, Objection not reserved till, Re-Hearings*.
HEARSAY, 304, *et seq*.
evidence to support credit, 209 *c*.
objections to, want of oath and of cross-examination, 304.
as to pedigree, ground of admission of, 317.
evidence admitted, without much scruple, in Scotland, &c., 325 *a*.
HEATHEN witness, how sworn, 65-6 *f*.
testimony of, 247 *b*.
"HEIR" as a term of description in a will, extrinsic evidence to explain the word, 284 *a*.
in a devise to, held to mean heir-at-law, 284 *a*.
claimant as, to show that elder branches are extinct, by slight evidence at least, 389.
ex parte paterna, or *ex parte materna*, which meant in a will, evidence as to, 284 *a*; see *Advancement, Ancestor, Disclaimer*.
HEIR-AT-LAW, advertisements for, 510.
ex parte paterna, and *ex parte materna*, inquiries as to, 179 *e*.
general and particular, 179 *d*.
inquiries as to such, *ib*.
issue, as to whether one is, 523 *a*.
issue as to title as, use of a deed and evidence of enjoyment under it, 319 *f*.
presumption of trust for, parol evidence to rebut, 294 *c*, *ad finem*.
promises by, preventing testamentary disposition, parol evidence to show and enforce, 293 *b*.
questioning a will, 523 *b*; see *Issue*.
right of, to have an issue, 179 *c*, 184-5.
can demand a reference to a jury, to try the validity of a will, 491 *b*.
suit to establish a will against, 179.
HEIRSHIP, inquiries as to, 490 *a*; see *Family, Finding of the Master, Kinship, Pedigree, Relationship*.
HERALDS' BOOKS, to prove a pedigree, 316 *i*.
COLLEGE, better evidence at, *ib*.
HERESY, where one witness to prove, insufficient (at law), 5 *b*.
HERETIC, witness being such; see *Moravian, Oath, Quaker, Separatist*, 65-6 *f*.
HIGHWAYS, certificates as to, 254 *c*; see *Lands, strips of; Magistrates*.
HINDRANCE to production of the best evidence, being documentary, proof of, 268.

HIRING, contract of, explanation of, 280 *f*.
HISTORY of a County, not evidence, 398 *f*.
general, documents of reference as to, 397; see *Camden, Chronicle, Dugdale, Speed.*
HIS VERBIS ET FIGURIS, requisition to set forth document, 24.
HOLDER of a bill; see *Declarations by Acceptor of.*
HOLLAND, Court in, sentence of, exemplification of, use of, 447 *d*.
sentence in, exemplification of, 154 *d*.
HOMICIDE, cases of, in which declarations of dying persons admitted, 316 *b*.
test of, *ib*.
HONESTY, proof of, 233-4 *a*; see *Character.*
HONOUR, claim to, bill to perpetuate testimony as to, 134-5.
and conscience, persons of, must testify what they know, 381-2.
obligation in, belief of, not rendering a person incompetent, 351.
of a peer or a lord of Parliament, 65-6 *f*; see *Pedigree, Peerage.*
"HONOURABLE MAN," 371 *e*, 372 *c*; see *Honour.*
HOUSE OF LORDS, 397.
although a Court of Appeal, look at evidence rejected below, 533 *c*.
how, corrects mistakes below, in not entering proofs as read, 934 *d*.
case laid before, mistake in, how corrected, 534-5.
decisions in, deference to, 402 *b*.
preventing inquiries directed by the Courts, 492.
proceedings in, when evidence not used has been entered as read, 535 *a*.
HOUSES, inspection of, by witnesses, preparatory to their examination, 62 *a*.
of Parliament; see *Parliament.*
Journals of, copies of, 149.
HUSBAND,
deceased, declaration of, as to legitimacy of his wife, 317 *e*.
former, declarations of, as against his interest, evidence of, admissible, 315 *a*.
ill-usage of wife by, 233 *d*; see *Wife.*
letters from to a wife to, how far evidence in the Ecclesiastical Courts, 345 *e*.
testimony of, exclusion of, 342 *f*.
of woman marrying again, presumed to have been dead, 480 *f*.
see *Access, Concealed Person, Married Woman, Undue Influence; Wife, admission by, as Agent; Woman, evidence of.*
HUSBAND AND WIFE, answers of, 28 *e* and *h*.
not examinable, in general, for or against each other, 50 *b*.
incompetency to testify, for or against each other, not removed by consent, 50 *b*.
privilege as to testifying, for or against each other, 80 *e*, *f*, and *g*.
of any person, in whose immediate and individual behalf, any action is brought or defended, incompetent, 327 *b*.
of a party interested, how far and why, cannot be examined, 341, *et seq.*
of certain persons, still incompetent, by the Act, 341 *f*.
of a party interested,
objection to a witness as such, waiver of, 341 *g*.
testimony of, excluded, even after the interest has ceased, 343.
of a person attesting a will, (since 1837,) gift to, by the will, void, 183.
of a creditor, competent witness to a will, (since 1837), 184.
privileged not to testify for or against each other, 377.
see *Credible Witness, Demurrer to Interrogatories*, 78 *c*, *Privilege, Protection, Relative, Separate Estate.*

IDENTITY,
proof of, 168 *a*.
of persons being unable to sign their names, and yet being attesting witnesses, 174 *b*.
executing a deed, proof of, 176, 177 *d* and *e*.
proof of, in proving death, 250 *a*.
of persons deceased, having made declarations or statements, necessity of proof of, 325 *b*
tried (at law) by inspection, 449 *a*.
of witness, how certified, 469 *b*.
IDIOCY, examination as to, 450 *a*.
IDIOT, incompetent to testify, 330 *c*.
IDLE; see *Admissions, Conversations.*
IGNORANT PERSON, affidavit by, 540 *b*.
ILLITERATE PERSON, affidavit by, *ib*.
and ignorant persons; see *Affidavits, Discrepancies in.*
ILLEGIBILITY of a written instrument, difficulty arising from, 280 *b* and *c*.
ILLEGITIMATE child deceased, declarations of, as to the family of his reputed father, not evidence, 318 *c*.
persons declared by Act of Parliament to be so, 475 *b*.
ILLNESS, dangerous, of a witness, ground for examination *de bene esse*, 121 *d*.
of Master warranting application to the Court, 137 *b*.
of a witness; see *Sickness.*
IMBECILE; see *Guardian, Superannuated Person, Weak.*
IMMATERIAL matters in pleadings, evidence as to, impertinent, 229.
although in issue, not to be proved, 238.
circumstances, may require to be proved, 244.
an allegation or averment may be, yet evidence in support of it material, 244-5.
IMPEACH the credit of a witness, examination to, 204, *et seq.*; see *Award, bill to impeach; Will, ejectment to set aside.*

IMPEACHED, deed not being, proveable by affidavit, 188 *e*.
document, examination of, by the judge, 451 *c*.
IMPEACHMENT, articles of, to discredit one who has sworn an affidavit in Ireland, 545 *c*.
IMPERTINENCE and scandal in interrogatories, 58 *e*.
scandalous not to be deposed, 86 *a*.
in depositions, 213 *b*.
in general, Orders as to, 214, *et seq*.
or scandal, in an interrogatory or deposition, process to have it suppressed, 214, *et seq*.
not being scandal, a party only can complain of; *secus*, as to scandalous impertinence, 214 *c*.
only, whether an examination, deposition, or interrogatories, can be referred for, 218
prolixity not amounting to, in depositions or interrogatories, 229 *c*.
not amounting to scandal, in depositions or interrogatories, motion as to, at the hearing, 230 *b*.
in depositions or interrogatories, costs of, 229 *c*, 230 *c*.
evidence as to general good character, 234 *d*.
in matters before the Master, 513 *e*.
in affidavits, 543 *h*.
reference for, 544-5.
IMPERTINENCY of Interrogatory, not a ground for demurrer, 81.
or irrelevancy, an objection to evidence, what is such, 229, *et seq*.
IMPERTINENT evidence to credit, taken on examination in chief, 205 *e*.
IMPOSITION, being alleged, the parties examined, 506 *b*.
IMPOSSIBILITY, evidence of, to repel presumption, 474 *f*.
IMPOTENCY, proof of, 233 *b*; see *Medical Man*.
IMPOTENT witness, 132 *c*, 142 *a*.
IMPOUNDMENT of vouchers, by the Ecclesiastical Court, 195.
IMPROPRIATORS, entries by predecessors of, as to tithes, 312 *f*.
IMPROVING the Law of Evidence, Act for, 326.
INABILITY, of a witness, to take the oath in the ordinary manner, how met, 66-7 *f*.
of a witness, to attend the Examiner, through age or infirmity, 67 *a*.
through incapacity to travel, *ib*.
of an administrator, to purchase estate with his own money, proof of, 474 *b*.
INADVERTENCE, cases of, relief in, 196.
INCAPACITATION of Master; see *Master*.
INCAPACITIES of witnesses, 326; see *Incompetence*.
INCAPACITY of witness, as letting in secondary evidence, proof of, 251; see *Blind, Deaf, Dumb, Impotent, Inability, Incompetency*.
INCESTUOUS MARRIAGES, voidable and void, 83 *a*.
INCOMPETENCY of a creditor, as a witness, &c., not to be objected by himself, 80 *e*.
of a witness, to a will, made after 1837, not to invalidate it, 183.
as letting in secondary evidence, 251 *c*.
in suits, &c., commenced since the 22nd of August, 1843, 325 *et seq*.
Act for Improving the Law of Evidence, as to, 326-7.
in suits, &c., prior to the 22nd of August, 1843, 328.
how ascertained at Law, 328.
in Equity, 329.
at Law, objection as to, taken at any time, 329 *a*.
general, 331; see *Attesting Witness, Handwriting, Idiocy, Infamy, Incapacity Lunacy*.
effect of crimes as to, 333-4.
considered in the Admiralty Court, 334 *b*.
duration of, 334.
restoration of Competency; see *Competency*.
removal of, strict proof of required, 335-6.
particular, interested persons, 336, *et seq*.
N.B. From this page slightly indexed, as to this head.
stat. 3 & 4 Wm. 4, c. 42, ss. 26, 27, not applicable to Courts of Equity, 336 *e*, 346 *b*.
of a party to the record, in Equity, as at Law, grounded solely upon his being interested, 337 *b*.
as between husband and wife, 341, *et seq*.
in the Ecclesiastical Courts, on ground of relationship or affinity, 345 *e*.
on ground of interest, test of, 346 *b*.
how barred or removed, 367 *f*.
person precluded from objecting, 368 *g*.
waiver of objection for, 369.
an objection not to be raised by the witness, if waived by the party, 369 *a*.
when limited to particular facts, 375-6.
of party, (to testify) to invalidate his own instrument, 385.
of a witness, use of answer to prove, 429 *c*.
see *Communications, privileged; Privilege of Professional Advisers*.
INCONSISTENT; see *Statements, Witness*.
INCUMBRANCE, paying off, presumption as to, 478 *c*.
INCUMBRANCERS, advertisements for, 510.
INDEMNITY; see *Interpleading Suit*.
INDIA, depositions taken in, ordered to be properly engrossed and stamped, 110 *a*.
commission to examine witnesses in, 116 *i*.
(and see *East Indies, West Indies*).
under stat. 13 Geo. 3, c. 63, s. 44, 116 *i*.
bonds or deeds or other writings, execution and attestation of, proof of, 265 *a*.
in Courts of, use of secondary evidence of a bond destroyed, 268 *c*.

INDICTMENT for perjury; see *Materiality, Perjury.*
INDIES; see *East and West.*
INDIRECT interest, as ground for incompetency, 345, *et seq.*
INDIVIDUALIZE a Witness, interrogatory to be framed so as to, 469, *ad finem.*
INDORSER of a note, no objection to, for incompetency, on ground of interest, 385 *b.*
of a note, not incompetent (to testify) to invalidate, 385-386 *a.*
INDUCTION, proof of, when unnecessary, 463 *e.*
INDULGENCE of the Court, granted, but on terms, 139.
INEBRIETY, proof of, 233 *b.*
IN FACTO quod in se habet et bonum et malum, magis de bono quam de malo præsumendum est, 474 *e.*
INFAMOUS persons, suggestion as to danger of the late alteration of the law as to, 336 *c.*
INFAMY, as an objection to credit, as distinct from competency, 206 *d.*
making a person incompetent apart from consideration as to his credibility, 333.
still an objection to the credit, 333 *c.*
INFANT,
a plaintiff being such, cause not heard on bill and answer, 51.
generally bound by conduct of their solicitor, 51 *e.*
rule in the Exchequer, when a party was such, 51.
party to a suit being, stricter proof required, 190.
party to a suit, in the Exchequer, being, exhibits proved by interrogatories, 191 *d.*
the admissions of, cannot be assimilated to admission of the principal, 464-5.
against such, no admissions or waivers available, 50 *c.*
answer of, 11.
not read against, 28.
use of, against the guardian, 428 *a.*
non use of, against the infant, 428 *d.*
guardian of, answer of, 10 *b.*
no exception in favour of, to the rule that matters to be proved must be alleged in the pleadings, 232 *e.*
non precluder of, by want of notice, 437 *b.*
production of, in Court, to see if living and still a child, 451 *b.*
not understanding the nature of an oath not competent to testify, 331 *f.*
see *Replication, Ward of Court.*
INFERENCES from handwriting, which follow proof of the hand, 263.
necessarily following from facts admitted, though such inference denied, 459.
which the Court will draw, 473, *et seq.*; see *Conclusions, Facts, Opinions, Presumptions.*
INFERIOR; see *Courts Inferior.*
evidence; see *Secondary.*
officers prevented from disclosing, 377.
INFIDEL, witness such, how sworn, 65-6 *f.*
witness being, credit due to, 471 *a*; see *Atheist.*
IN FORMA PAUPERIS, affidavit to sue, even by one convicted of perjury, admissible, 545 *c.*
INFORMATION, *vivâ voce,* to the Court; see *Contempt, Ward of Court.*
INFORMERS employed by police, 377.
INFIRMITY of a witness, preventing attendance at the Examiner's office, 67 *a.*
INFLUENCE of reputation of a witness, not ground for a change of the venue, 529 *a.*
see *Undue Influence.*
INHABITANTS, statements by, how far admissions, as to liability to repair a bridge, 463 *c.*
INIQUITOUS defence, consequence of making, 245-6.
INJUNCTION, suits, bills in, forms of, 17.
evidence of Mr. Heald as to, *ib.*
in case for, no necessity to amend bill to put in issue facts admitted by the answer, 27 *b.*
cases, on an allegation of piracy, or infringement of patent right, 454.
meantime, on grant of a commission to examine witnesses abroad, 115 *g.*
continued, whilst commission to examine abroad issued, 117 *d.*
extended, whilst commission to examine abroad issued, 117 *e.*
special, order for, recitals in, 162 *f.*
on motion for, answer is evidence for the defendant, 428 *c.*
to obtain on motion, before answer is filed, affidavit used, 539 *e.*
writs and orders, in the nature of, 545 *d.*
by Court of Exchequer, prevented a party obtaining, in Chancery, a commission to examine witnesses abroad, 115 *g.*
IN ODIUM SPOLIATORIS, slight evidence admitted, 275 *b.*
IN PARI CASU, persons being, as to competency of, 358-9.
witness being, objection to his credit, not his competency, 347-8; see *Declarations, Statements.*
IN PERPETUAM REI MEMORIAM,
examination, 121 *a.*
ancient orders, 129, *et seq.*
Lord Bacon's orders, 153.
publication of depositions, 141-2.
examination of witnesses, not differing from ordinary one, 144 *c.*
depositions in a suit, order as to use at law, 256 *b.*
depositions of witness, since become interested, refusal of, at law, 367 *b.*
INQUIRIES,
some, before the Master only, 240 *b.*
granted, although, it may be, fruitless, 240 *a.*

INQUIRIES—*continued.*
Accounts, and Preliminary, Order as to, 489-90.
preliminary, not unfrequently lead to others, 492 *a*.
further, after publication passed, 501 *d*.
Affidavits, an Order as to, 512 *d*.
before the Master, as to loss or destruction of a document, 272 *c*.
as to documents, 490 *a*.
as to facts not in the pleadings, or not put in issue, 491 *c*.
as to heir-at-law of testator or intestate, suggestions as to, 179 *d*.
as to heir or co-heirs, general or particular, 179 *e*.
as to judgment at law, how obtained, 432.
usual, as matter of right, upon a *primâ facie* case, or a fundamental fact established, 490 *a*.
special, a case for, on the record, yet no special interrogatory for the examination of the defendants allowed, without order, 515 *h*.
as to a will, 491 *b*.
as to due search for a witness not found, 253; see *Preliminary Accounts and Inquiries.*
INQUISITIO POST MORTEM, 160.
when evidence, *ib. a*.
INQUISITION, persons found by, of unsound mind, validity of deeds executed by, 524 *a*.
use of, in pedigree cases, 316 *i*.
wanting, 166 *a*.
INROLMENT of conveyance to charitable uses, under stat. 9 Geo. 2, c. 36, 157 *a*.
of Acts of Parliament, 404.
INSANE PERSONS, incompetent to testify, 330.
except in *lucidis intervallis*, 330 *d*; see *Witness to a Will, having become.*
INSANITY, proof of, 233 *b*; see *Lucid Intervals, Lunacy, Medical Men, Madness.*
in the Ecclesiastical Courts, *ib.*
general proof of, 331 *d*.
presumed to continue, 479 *c*.
of a witness, as letting in secondary evidence, proof of, 251 *c*.
of the accused, in criminal cases, on a question of, medical man, nature of the examination of, 470 *a*.
presumption as to continuance of, 474 *c*, 479 *c*.
INSCRIPTION on Monument or Tomb, proved by copy, and why, 149, *ib. b*.
on rings, evidence of pedigree matters, 319 *b*.
on tombstones, evidence of pedigree matters, 318-19 *a*; see *Age.*
INSOLVENCY, documents made evidence, by Acts as to, 155 *a* and *b*; see *Statutes.*
INSOLVENT ACTS, documents made evidence by, 156 *a* and *b*.
INSOLVENT, office copy of the Judgment, entered up against, 190.
assignees of, bound by his admission, 464 *b*.
INSPECTION
by the Judge, of deposition of witnesses, examined, *de bene esse*, 142.
by a Judge, 144 *b*; *viz.*, examinations *ad informandum conscientiam judicis.*
of documents, right to, contra-distinguished from that to possession, 274 *c*.
of documents, right to, 490, *et seq.*, 30 n., *f* and *k*.
of documents by witnesses, prior to their examination, to enable them to answer interrogatories, 200 *c*.
of documents; see *Documents, Production.*
of exhibits, 146 *a*.
of exhibits proved, as to right to, by adverse party, 192 *e*, *ib. c*.
and comparison of handwriting, 266.
of records, 169.
of parish registers, 169-70.
of public documents, 170 *a*.
of proceedings in inferior Courts, 169-70.
by witnesses, opportunity for, provided for by the Court, 62 *a*, 200 *c*.
where the Court resorts to, 449, *et seq.*
decision by, obsolete at Law, 450.
but similar power used in Equity, *ib.*
or Examination, trial by, 449, *et seq.*
in Equity, 450.
INSPECTOR of Franks,
witness as to handwriting of an M.P., 265-6.
evidence of, as to handwriting, rejected, 267 *b*.
INSPEXIMUS,
Order as to the examination of, 411 *b*.
as secondary evidence, 416 *d*.
INSTITUTION, proof of, when unnecessary, 463 *c*.
INSTRUMENTS,
bill for discovery of, affidavit annexed to, 539.
not out of proper custody, not available in evidence, 313 *c*.
executed and attested in India, proof of, 265 *a*.
by *primâ facie* evidence, shewn to be false, *onus probandi* as to, 246.
shewn to be false, *onus* of supporting lies upon the party claiming under, 390 *a*.
given in evidence, to be invalidated only, need not be stamped, 391 *b*.
loss or want of; see *Accident.*
testimony of witness to, 386.
void, for uncertainty, 279 *c*.
see *Attesting Witness, Consideration, Date, Deed, Document, Handwriting; Lost, stamp on; Note, Stamps, Will, Written instrument.*
INSUFFICENCY; see *Materiality*, 20.
Masters, authority as to, 21.
exceptions as to, 25.
in matters before the Master, 513 *c*.
of examination before the Master; Master's decision as to; objections to the decision; certificate; exception on, 520-1.
when defendant a witness, 24 *d*.
see *Certificate, Exceptions.*

INSUFFICIENT; see *Answers.*
the (unsupported) testimony of a single witness against a distinct and positive assertion in the Answer, 4, *et seq.*, 227 *a.*
evidence; see *Expense of an Inquiry.*
examination, costs of, 521 *a.*
before the Master, allegation of, process on, 328.
INTEGRITY, proof of, 233-4 *a*; see *Character.*
INTEMPERANCE; see *Adultery, Inebriety, Lewdness.*
INTENTION of parties to a deed,
parol evidence not admissible to show, or negative, 277 *a.*
evidence to show refused, 284 *c.*
to execute a power, parol evidence of, not admissible, as in some other cases, 287 *a.*
INTERLOCUTORY ORDER, as to, and of what it is evidence, 490 *a*, 424 *d.*
INTEREST,
incompetency arising from, 325; see *Incompetency.*
incapacity from, removed by the Act for improving the law of evidence, 325.
re-examination on point of, 329-30.
inquiry as to, 390 *b.*
sole ground of incompetency of a party, now only an impediment to his credibility, 337 *b.*
indirect, as ground for incompetency, 345, *et seq.*
(even prior to the late Act) an objection rather to the credit than the competency of a witness, 346-7.
incompetency or incredibility on account of, old cases, as to, 349.
to render a person incompetent,
was personal, 349-50.
a present interest, 350.
mistakes about, *ib.*
however minute (was) ground of incompetency, 354.
acquired after, not affecting competency, 365-6.
of witness, balanced, his competency unaffected, 365.
witness interested, evidence of, given whilst disinterested.
see *Against Interest; Declarations, &c.; Self-interest.*
derivative, 464 *a*; see *Assignees, Administrators, Executors, Representatives.*
of persons not parties, inquiry as to, 491-2.
of persons not before the Court, inquiry as to, 491-2 *a.*
of third parties; see *Incompetency, Inquiries.*
INTERESTED
persons, suspicion which attaches to, 227 *f.*
jury would so look at a defendant, examined, or his answer read, *ib.*
INTERESTED—*continued.*
persons, may be competent, but less credible, 336 *d.*
the testimony of, when excluded, 352-3.
witnesses admitted, sometimes, *ex necessitate rei*, 367.
see *Attesting witness, Handwriting, Interest.*
INTERESTEDNESS, affecting or tending to affect the credit of a defendant as a witness, 227 *f*, 471 *a.*
INTERLINEATIONS in a deed, 452.
in a deed, presumed, in a Court of Equity, to have been before the delivery, 452 *a.*
of exhibits; see *Forgery, Tampering.*
in a will, since 1837, 452 *d.*
INTERPLEADER, in suit of, answer of a defendant read against another, 428 *f.*
bill of, affidavit as to, conclusive, 538 *f.*
affidavit as to, Lord Chancellor Eldon's observations on form of, 538 *f.*
see *Interpleading Suit.*
INTERPLEADING SUIT, evidence that plaintiff is acting under an indemnity, from some of the defendants, admissible in, 232 *f.*
INTERPRETATION of Wills, the application of Extrinsic Evidence to, 278-9 *a*, *et seq.*
INTERPRETER of an Instrument written in a Foreign language, 280 *a.*
of provincial dialect, 280 *d.*
sworn, his duties, 104 *c.*
duties of when Foreign witness examined abroad, 119 *a.*
to keep depositions secret until publication, 120 *a.*
between client and professional adviser, restricted in his testimony, 380 *f.*
INTERROGATORIES,
in a bill, how to be answered, 19 *b.*
insufficiently answered, to be set forth in exceptions, 25.
in a bill first suggested by the answer, 518 *d.*
examination of a witness upon, at law, 121 *d*; and see *De bene esse.*
examination upon, at law, 124, *et seq.*, 125, 126, *ib. a.*
examinations upon, at law, when unavailable, 143 *c.*
(at law) held inadmissible, when raising a collateral inquiry, and not tending to affect the issue, or test the credit of the witness, 232 *c.*
witness not examined on, in a criminal case, 49 *d.*
FOR THE EXAMINATION OF WITNESSES, when "apt" are "the life of the 54 *a.*
how came to be framed by counsel, 52.
as to drawing and perusal, 54 *a* and *b.*
to be signed by counsel, 54 *b.*
when to be settled by the Master, 54-5 *a*, 201, 516, 519, 520.

INTERROGATORIES FOR THE EXAMINATION OF WITNESSES—*continued.*
Ld. Eldon's account of having drawn such, guessing, &c., 102 *f.*
as to the preparation of, the difficulty of, evidence of the V. C. of England, 54 *b.*
instructions to counsel, to settle and sign, meagre, 73 *a.*
before preparation of, duty of solicitor, 221 *i.*
forms of, infinite in number, 55.
Mr. Bell's evidence as to such, *ib.*
forms of, see Appendix.
only one set allowed, 55.
prolixity of, why, and how far necessary, *ib.*
Order of Ld. Clarendon, C., as to, 54 *a.*
of Jeffreys, C., 54 *b.*
of Coventry, K., 56 *c.*
form of heading, 59.
title of, 221 *a.*
error in, how rectified, 223 *a.*
first of a set of, form of, 59.
use of such, *ib.*, n. *c.*
Order by Ld. Coventry as to such, *ib.*, n. *d.*
ending of each one of a set, form of, 59.
the last of a set, old form, 60.
new form, *ib.*
new form need not, though old form must not, be used, 60 *c*, 61 *a.*
usual form, 73 *c.*
GENERALLY, the orders, &c., regulating, 70 *a.*
FOR CROSS-EXAMINATION OF A WITNESS, 61.
filing with examiner, 63, and n. *g.*
jurat to, 65.
any alteration in the title or any other part, necessitates the reswearing of the witness, 67.
filed, no copy of such need be taken by the party who filed them, 72 *a.*
demurrer to, 77 *d.*
scandal and other impertinence in, 58 *e.*
impertinence in, not being scandalous, motion as to, postponed till hearing, 230 *b.*
leading, expunging, 213 *a.*
the error of counsel, consequences of, remedied, 197 *c.*
new, leave to file, to supply defects occasioned by errors, 197.
filing, after suppression, 213.
objection to, insufficient, 221 *c.*
not being prepared (in time), consequences, relief from, 222 *c.*
anciently contained one, whether the witness interested, 329 *d.*
for examination of witnesses under a commission, 98, 99 *c.*
for examination of witnesses under a commission, produced and left with commissioners, 99 *c.*
for examination of a witness anciently annexed to the commission, when given to commissioner, 102.
formerly delivered to commissioners at the opening of the commission, 102.

INTERROGATORIES—*continued.*
exhibited before commissioners from time to time, 102 *f.*
as to "feeding" the examiner with, new may be exhibited, from time to time (until publication), for the examination of any witnesses on matters as to which such witnesses have not been examined: but to be allowed to do this even, before commissioners, leave must be obtained, 70 *a.*
new, for examination of witnesses by commissioners, leave to exhibit must be obtained, 106 *f.*
(allowed), on special motions, 61.
to prove sanity of a testator, 198 *i.*
to prove exhibits, 146 *d.*
leave to exhibit, to prove a document, 189 *i.*
every fresh set, before commissioners, witness must take oath again, 104 *c.*
for further examination of a witness before the Master, to be settled by the Master, 201.
parties to be examined on, under order for a reference, 501 *c.*
necessary on a reference, 502.
defendant to be examined on, only "in a very special case, &c.," 210 *a.*
for the examination of a defendant after answer three times, insufficient, 210-11.
for the examination of a defendant; see *Defendants, Statements.*
for the examination of an accounting party, 515.
for the examination of a party, settled by the Master, prepared by the solicitor or counsel, 516 *a.*
for examination before the Master, of a creditor or other claimant, 519-20.
for the re-examination of witnesses, to be settled by the Master, 519 *a.*
for the examination of one *pro interesse suo*, to be settled by the Master, 519.
to be settled by the Master, may be prepared by solicitor or counsel for the party most interested, yet all who have an interest attend at settling, 516 *b.*
settled by the Master, objections to, special report as to, certificate, and exceptions, 520.
motion to add, for the examination of a defendant, whose examination is reported insufficient, should be on notice, 521 *a.*
motion that plaintiff might communicate, to defendant, refused, 113 *d.*
see *Demurrer to; Depositions, Executor; Examination of, Suppression, Testimony, Witness.*
INTER VIVOS; see *Donatio inter vivos.*
INTESTATE, declarations by, evidence of, to prove a gift of stock, 313 *d.*
heir-at-law to, issue whether one is, 523 *a*; see *Administrator as representing.*
IN TESTEM TESTIS, ET IN HOS, SED NON DATUR ULTRA, maxim of the Civil Law, 204 *b.*

INTRINSIC evidence, of genuineness and the like, 187.
INVALIDATE; see *Deed, Exhibit, Forgery, Instrument, Will, Witness.*
INVALIDATED instrument need not be stamped, 391 *b.*
INVENTOR; see *Scientific Witnesses.*
I O U, 187 *c*; see *Stamp.*
of what, *primâ facie* evidence, 390 *a.*
IRELAND,
Chancery of, Court of, rules as to evidence in, 6 *a.*
cross examination in, 61 *d.*
record of, not produced in civil action, if the office copy might be sufficient, 150 *f.*
see *Chancery of Ireland.*
Commissioner of Court of Exchequer in, 541 *g.*
an attesting witness being in, proof of his handwriting admitted, 251 *g.*
Affidavits in, Act as to, 542-3.
see *Credit, Impeachment of.*
Master-extraordinary in, authority of, recognised here, 541 *g.*
statutes of Great Britain, proof of, in, 406.
statutes of, prior to the union, proof of, in England, 407 *a.*
Witness in, 122 *d*, 126*, 251 *g.*
see *Lease, recital of; Marriages in; Peerage, Irish; Pro interesse suo.*
IRREGULAR publication taken of depositions *de bene esse*, 145 *f.*
IRREGULARITY, motion to suppress depositions for, too late after exhibiting articles to discredit the witness, 205 *e.*
in depositions, 213 *c.*
time to look for, 213 *d.*
in taking examinations, 219, *et seq.*
instances of, 219, *et seq.*
ISLANDS, 125; see *Colonies, West Indies.*
ISSUE,
when a fact proved by a single witness against the answer of a defendant, 5 *a.*
testimony, single, but supported, opposed to answer, defendant may claim, as of right, 523 *h.*
of fact, reasons for directing, 72 *e.*
directed, on interlocutory application, to determine a fact, 290 *a.*
not to be directed to try a matter not fully put in issue, 492 *b.*
but an inquiry may be, *ib.*
to try title, 492 *d.*
of fact, 523, *et seq.*
some almost "of course," 523 *e*; see *Heir, Modus.*
common form of order for, 523-4.
referred to the Master to settle, in case the parties differ about the same, 524 *a.*
to what Court usually directed, 524.
feigned, nature of, 525.
parties to be examined on trial of, 525.
ISSUE—*continued.*
parties, liberty to as to examining each other as witnesses, 525 *f.*
directed by the Court of Bankruptcy, examination of the parties on trial of, 525 *f.*
of law, sent to be tried again by another Court, 532.
of law, 530, *et seq.*; see *Case; Opinion.*
sent to law, when new one directed, 532.
directed to Court of Law, that Court may issue commission to examine witnesses abroad, 118 *a.*
granted, when testimony of single witness corroborated by circumstances, is admitted against an answer, 5 *a*, 227 *d*, 523 *h.*
secus, when not, 227 *d.*
of fact, the practice of sending to law, whether quite wholesome, *qu.* 228 *b.*
not directed, as to matter not in issue, 231 *c*, or duly pleaded, 232 *c.*
when directed, on questions of pedigree, 318 *c.*
directed, evidence on trial of, 259 *b.*
reading of depositions in the suit, *ib.*
sent to be tried before a jury, use of hearsay evidence on the trial, 325 *b.*
sent from Chancery, not usual to enter up judgment, 161 *e.*
directed by a Judge in Equity, to transfer the responsibility, 486.
on trial of, order that the parties be examined, 341.
default on trial of, 525.
on trial of; see *Examination of Persons; Knowledge.*
before Master's report, 522.
right of heir-at-law to, 179 *c.*
devisavit vel non, right of heir-at-law to have, 184-5.
being directed, as to all the witnesses to the will being examined, 184-5.
as to document charged to have been forged, but sworn to have been executed, 451 *c.*
of disputed facts, 489.
of doubtful law, 489.
not directed in a suit to redeem, though the title complicated, if it be uncontradicted, 490 *a.*
see *New Trial; Verdict on Trial of.*
taken *pro confesso*, 525 *c.*
OF THE BODY,
legacy to, by ancestor, ademption of, by portion, 298 *g.*
leaving, raising presumption of, revocation of a will, 302.
death without, proof of, by hearsay evidence, 320 *d.*
after marriage, testimony of parents to bastardize not admitted, 384.
in tail, promises by, preventing disentailment, parol evidence to show and enforce, 293 *b*; see *Heir-at-Law.*
JOINING, present mode of, 27 *a.*

ISSUE, JOINING—*continued.*
mode of, under Order No. 93, of May, 1845, 52 *b.*
by filing replication, 94 *a.*
present mode, 238 *d*; see *Facts not in the Pleadings; Matters in and not in; Point raised by the Court.*
a fact not in, evidence admitted of, under peculiar circumstances, 196 *c.*
none between co-defendants, consequence as to their answers, 29, and n. *b*; see *Put in Issue.*
at law, not granted, as to matter not in issue, 231 *c.*
PUTTING IN, admissions in answer, 26.
facts by amendment of the bill, 27.
with a view to enter into evidence as to them, 27 *a.*
admitted by the answer, in an injunction case, 27 *b.*
matters, or no evidence admissible as to them, 27 *a*, *sed vide* 196 *c.*
amendment of bill, *ib.*
letters come into the possession of defendant after answer, 196 *c.*
ROLL not sealed, not a Record, 164 *e.*

JACTITATION of Marriage, suit as to, 440, *et seq.*
JAMAICA, power of attorney enrolled at, proved by copy, 149 *c.*
enrolment in, 419 *d.*
JEALOUSY attaching to a man who, upon his oath, asserts that to be false which he has, by his solemn act, attested to be true, 386.
JEW, witness such, how sworn, 65-6 *f.*
JEWISH RABBI, register by, of circumcision, not evidence, 307 *e.*
JOINT AND SEVERAL demands, plaintiff having, Order as to parties to the suit, 241 *a.*
JOINT STOCK BANK, shares in, purchase of, by a father, in the name of his son, not an advancement, 315 *a*, *ad finem.*
JOURNALS of either house of Parliament, copies printed, 149.
of House of Lords, or of Commons, copies of, admissible, 149-50.
use of a recital in, 150 *a.*
evidence of public facts, not in Gazette, 401 *b.*
judicial notice of, 408 *b.*
JUDGE,
of the Custom-house Court of St. Petersburgh, opinion of, 448 *b.*
in the Court of Chancery
to estimate the credit due to the evidence, 472 *a.*
deprived of the benefit of an oral examination, and observation of the demeanour and conduct of the witness, 496.
uses a power similar to that at law, in trials by inspection, 450 *b.*

JUDGE—*continued.*
decisions of, caution as to, 486.
suggestion (by Mr. Gresley) of addition to number and powers of, 499 *b.*
some since added, but power to examine *vivâ voce* not extended, 499 *b.*
who feels a difficulty, directs an issue, 523.
who directed an issue, application to be first made to, for new trial, 528 *e.*
who tries issue, notes of, sent for, by the Judge in Equity, 528 *a.*
can call other Judges to his assistance, and deliver his judgment, aided by their advice, 530 *c.*
who entertains a doubt, ought to send a case to a Court of Law, 530 *c.*
knowledge, experience, learning, &c., of, 395-6.
memory of, assisted by documents of reference, 396, *et seq.*
use by, of historical criticism, with judicial caution, 398.
knowledge of, as to acts of government and political matters, 399.
Common Law, called to the assistance of the Chancellors, 530 *c.*
at Chambers, case sent to law, directed to be argued before, 532 *a.*
notes of, on trial of an issue at law, as to use of, 528 *a.*
satisfaction of the conscience of, with verdict on an issue, 528, 529.
signature of, authenticating exemplification without a seal, 154-5.
signatures of, instead of seal of the Court, of no avail, 159.
signature of, by stat. 8 & 9 Vict. c. 113, s. 2, to be taken cognizance of, 413.
certificate of, to prove records, 253 *e.*
(at law), directs the jury as to presumptions, 484 *b.*
in the Order as to new trials, means Judge of same Court (V. C. or M. R.) not necessarily the same individual, 528 *d.*
in Wales, certificate by, 254 *b.*
opinions of, as to the value of particular reports, and decisions doubted, 402 *c.*
verbal questions by, and verbal answers to, 500.
as to, Bacon's Essay of Judicature referred to, 500 *a*; see *Prerogative Court.*
JUDGMENT,
subpœna to hear, 145 *h* and *i.*
not a record, copy of, not evidence, 164 *d.*
so judgment book, *ib.*
any person interested in, may compel plaintiff to enter it up, 164 *e*, 156 *a*, and *b*; see *Insolvent Acts.*
destroyed by fire, verified copy admitted, 165 *f.*
given in evidence in another suit, &c., 359 *c.*

JUDGMENT—*continued.*
what not evidence of, 424.
at Law, use of, in Equity, as evidence, 430, *et seq.*
used in the shape of a plea, 432 *a.*
at Law, inquiry whether fairly or under any other, and what circumstances obtained, 432 *b.*
at Law, fairly obtained, to be conclusive in Equity, 432 *b.*
at Law, use of, in subsequent actions at Law, 434 *d.*
in Courts, not Courts of Record, 434-5; see *Decree, Interlocutory Order, Order.*
Foreign, when open to examination, and how examined, 447; see *Sentences.*
JUDICIAL COGNIZANCE, where the Court takes, *suo motu*, 395, *et seq.*
modified, or not *suo motu*, 408, *et seq.*
of the Master, 505 *d.*
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, 397.
use by, of evidence not produced before the Court below, 535 *a.*
JUDICIAL DOCUMENTS generally, 421, *et seq.*
JUDICIAL NOTICE not (taken) in what country a place is situated, 396 *b*; see *Document, Judicial Cognizance.*
JURAT of affidavits, 541 *d*, 543 *c* and *f.*
JURIS ET DE JURE; see *Præsumptiones.*
JURISDICTION,
out of, a document being, 274 *c.*
defendant being, inquiry as to, 492 *a.*
of Chancery, judgment of King James, as to, 431 *b*; see *Accident; Fraud; Lost Document; Trust.*
Competent, Court of, sentence, decree or judgment by, 430-1.
of Ecclesiastical Courts, as to wills, 178, 179 *a*, 182 *b.*
of Court of Law, when exclusive, 432 *b.*
JURY,
trial by, to ascertain the credibility of a witness, 5 *b.*
evidence (of an informing nature), to be laid before, 397 *c.*
formerly bound to believe, 420.
not to try a presumption of law, 474 *a.*
directed by the Judge, as to presumptions of fact, 484 *b.*
rely on the Judge, as to presumptions, 486 *a.*
some absurd decisions of, 486.
an evanescent tribunal, responsible and unpopular decision thrown upon, 523 *d.*
see *Grand Jury, Special Jury.*
JUSTICES, certificates by, 254 *c.*
examinations before, use of, 262.
OF THE PEACE, authorized to take and receive statutory declarations, 460-1.

KING; see *Crown, Queen.*
KING'S Courts, seals of, prove themselves, 412, 413 *a.*
KING'S—*continued.*
printer, copies printed by, 148 *c* and *d.*
copies purporting to be printed by, 148-9.
copies printed, or purporting to be printed, by, 408 *a* and *b.*
Letters Patent, may be enrolled in Courts Record, and exemplified, 415 *a.*
Marshal; see *Marshal.*
sign manual; see *Certificate.*
Privy Seal, 413 *f.*
Remembrancer's Office, records in, 165-6.
Silver Office, Fine perfect when it has passed, 169 *d.*
testimony, 254 *f.*
KNOWLEDGE,
of handwriting, how acquired, 265-6.
confidentially obtained, as by attorney or solicitor, privileged, 380.
of the law, presumption as to, 474 *b.*
of the plaintiff and defendant only, in cases of facts resting, as to their examination, on an issue directed, 525 *d.*
of the party, tested by affidavit, 539 *f.*
of the party; see *Interpleader, Bill of, Affidavit on.*
of presumption of law, 478 *a.*
of the subject, by persons deceased, how far of itself ground to admit declarations, 315 *a*; see *Criminal Knowledge, Universal Notoriety.*
experience or learning of the Judge, 395-6.
of various kinds, of utility to the Court, and used by it, 396 *c.*
want of, as to the facts, by persons deceased, only affects the credibility, not the admissibility, of declarations against their own interests, by them made, 375 *b.*
KINSHIP,
evidence of, reputation as to, 307 *e.*
next of, inquiries as to, 490 *a.*
letters of administration not proof of, 444 *c.*
grant of administration not conclusive evidence of, 414 *a.*
see *Next of Kin; Pedigree; Preliminary Inquiries; Relationship.*

LACHES, effect of, in precluding a party from relief, in cases of defect or omission of proof, 196 *b* and *c.*
of a party, prejudices his rights to make objections, 370-1.
in proceeding with a commission, upon an order for new trial and commission, effect of, 529 *a.*
LAND, strip of, 281 *b.*
Revenue Record and Inrolments, office of, 166 *a*; see *Crown Lands, Revenue.*
LAND-TAX Assessments, presumption as to, 478 *f*; see *Assessments, Books of.*
LANDLORD, or other person, in whose right any defendant in replevin may make cognizance, 327 *b.*
title of, *primâ facie*, evidence of, 463.

LANGUAGE, English, use of, not enforced, in wills, deeds, or agreements, 280 *a*.
Foreign, use of, in an instrument, difficulty occasioned by, how cleared up, 279, 280 *a*; see *Foreign, Interpreter*.
LAW,
Judges, at Common Law, held that depositions of living persons could not be read; although they had become interested, 366.
issue of, 530, *et seq.*; see *Case; Opinion; Order for an Issue at*.
presumption of, 473, *et seq.*; see *Præsumptio, Presumption*.
see *Actions, Admissions, Canon Law, Civil Law, Common Law, Conclusions, Court of; Court of, rule of; Criminal Law, Documents, Issue, Judgments, Jury, Proceedings, Sentence, Text Book, Trial, Verdict*.
and Practice, means of proof of each, 401.
LAWS OF THE LAND, use, by Judge, of documents, for reference as to, 397; see *Text Books*.
compelling breach of private confidence, *dictum* of Lord Camden, C., as to, 381-2.
obedience due to, 381 *e*; see *Eldon, Equity, Judges*.
LEADING QUESTIONS,
Order forbidding such, in interrogatories, 54 *b*.
definition of such, 57 *d*.
evidence in answer to such suppressed, *ib*.
in interrogatories, inconvenience occasioned by such, 58.
in interrogatories, such disallowed, *ib*.
occasioned by an error of counsel, consequences remedied, 197 *g*.
expunging, 213 *a*.
see *Depositions, Interrogatories*.
LEASE,
argument for, in writing, not to be added to, by parol, 277-8.
expired, use of, 166 *a*.
though not enrolled, 166 *a*.
modern and ancient, use of, 311 *a*.
recital of, in Release, in Ireland, evidence of, 462 *d*.
recitals in, of former leases, 462 *b*.
lost, what sufficient search for, 269 *c*.
and Release, pleading of, at law, 173 *f*.
stat. 4 Vict. c. 21 *f*; see *Release*.
for a year, and copy of Release, the original not being forthcoming, effect of, as evidence, 271 *b*.
for a year, use of, as secondary evidence, *ib*.
and Release, lost, proof of, 271 *ib*.
grantor of, estopped by, 461 *c*; see *Grantee, Grantor*.
lost, prior to the Act for making a Release as effectual as a Lease and Release, 462.
made by Churchwardens, 479 *b*.
LEGACIES,
presumption as to, not being accumulative, 294 *b* and *c*.
LEGACIES—*continued*.
being accumulative, when presumption does not arise, 295.
not being accumulative, presumption arising rebutted by parol evidence, 297 *c*.
by one instrument, that two intended to be given, *onus probandi* is on the legatee, but by separate instruments, *secus*, 390 *a*.
LEGACY,
to creditor, presumed to have been intended in satisfaction of debt, 478 *e*.
duty, payment of, evidence of, 159 *f*.
payment of, presumption as to, 478 *e*.
from a stranger, not considered a portion, but may be proved so to be, 299 *b*.
suit for, rarely brought in the Ecclesiastical Court, 296.
to persons attesting a will, since 1837, void, 183.
see *Ademption, Presumption as to; Portion; Substitution*.
LEGHORN, decree at, use of, 447 *d*.
LEGIBILITY, of an instrument written, difficulty as to, how overcome, 280 *b*.
LEGIBLE, depositions suppressed for not being, 220 *g*.
affidavits to be, 543.
LEGITIMACY, presumptions as to, 475.
see *Access, Bastard, Filiation, Husband and Wife, Marriage*.
LEPROSY of a witness, as letting in secondary evidence, 251 *d*.
LESSEES; see *Crown, Lessees of; Lease*.
LESSOR, of plaintiff, not rendered competent, by the Act for improving the law of evidence, 327 *b*.
LETTER, proof of, 186-7.
proof of custody and genuineness of, 186 *f*.
of agency of writer of, to let in, 465 *b*.
of agent, to prove an agreement by the principal, refused, he to be examined, *ib*.
of instructions from plaintiff, as principal, to his agent, *ib*.
proof of handwriting, 265 *e*.
delivery of, *primâ facie* evidence of, 186 *c*.
familiar, use of, in pedigree cases, 316 *g*.
of husband to wife, how far evidence in the Ecclesiastical Court, 345 *e*.
from one party to another, expressed to be "without prejudice," the reply is so also, 47 *a*.
of a party, evidence for himself at law, only as a notice, or as a demand, 187 *c*.
truth of, inferred, as against the writer, 264.
stated as forming an agreement, 245 *a*.
being set forth in the bill, as constituting a contract, other evidence, supplying terms, inadmissible, 237 *g*.
as constituting or evidencing an agreement, distinction as to, 277 *a*.
for construction or explanation of, use of extrinsic evidence, 283 *d*.
use of, as extrinsic evidence, to explain a will, 283 *d*.
use of, letting in the answer to, 466 *c*.

LETTER—*continued.*
stamped, after production, to make it receivable, 391 *b*.
use of, to prove handwriting, 267 *b*.
must be shewn to a witness before he is asked whether he ever wrote such a letter or not, 388 *a*.
stated in a deposition of an agent, to have been written by him, deposition proof of that, but not of the letter, not being produced, 465 *b*.
instance of, rejected, in suit in Admiralty Court, in Equity, in Bankruptcy, 187 *c*.
book, merchant's, proof of letter having been sent, 186 *c*.
entries in, 310 *b*; see *Admissions, naked.*
LETTERS OF ADMINISTRATION no proof of death of intestate, 250 *a*; see *Kinship; Marriage.*
LETTERS OF MARQUE AND REPRISAL, grant of, 445 *g*.
LETTERS PATENT, effects of, in evidence, 415; see *King's.*
recitals in, 415-16.
exemplifications of, 415 *a*; Order as to, 415 *d*.
seal burnt, order to enrol, 453 *b*.
of another Court, the Court doth not take notice of, unless they be offered, 415 *c*.
LEWDNESS, proof of, 233 *c*.
LIBEL, witness not bound to admit himself guilty of, 81-2 *a*.
publication of, inferred from the proof of having copied it, 264.
LIBEL IN THE ADMIRALTY COURT, 163.
LIBEL IN THE SPIRITUAL COURT, 164.
LIBRARIAN, examination of, to prove an exhibit, 189 *a*.
LICENCES for fishing, use of, 311 *b*.
LIMITATIONS, see *Adverse Possession.*
statute of, use of, 406; evasion of, 462, 465 *b*.
effect of pleading, as to admissions, 22 *d*.
LIQUOR; see *Drunk, Inebriety.*
LIS, definition of, 322 *a*; see *Post Litem Motam.*
LISBON, commission to examine witness at, 120.
LITERARY WORK, agreement as to, parol evidence admitted to explain, 278 *a*.
LITHOGRAPH; see *Print.*
LIVING, a witness, who may be produced, his depositions not read at law, even though he has become interested, 366 *a*.
presumption as to a person being, 474 *c*.
LLOYD'S LIST, how far may be evidence, 172 *b*.
LOANS; see *Advances, Mortgage.*
LOCAL CUSTOMS, proof of, 235-6.
USAGE, affording ground for presumption, 479 *b*.
LOG-BOOK of a ship, rules as to use of, in the Admiralty Courts, 445 *h*.
LONDON, City of, seal of, recognised, 413 *g*.
corporation of, suits for tonnage duty, 261.
LONDON—*continued.*
Lord Mayor and Aldermen of, certificate of, by Recorder, 253 *d*.
see *Commissioner, Examiner, Irregularity.*
LONG VACATION, from the 10th of August to the 28th of October, both inclusive, 137 *a*.
LORD TREASURER'S REMEMBRANCER'S OFFICE, records in, 165.
LORDS, HOUSE OF, Appeals to, rules of evidence on, 3 *a*.; see *Appeal, House of, Journals, Parliament.*
LOSS of books, consequent directions, in order to take accounts before the Master, 514 *b*.
of a deed, &c., letting in secondary evidence, 268.
recited, (in an ancient conveyance,) throws no doubt on the title, 479 *a*.
of a document, &c., when slight evidence admissible, 270.
reference to the Master as to, 272 *c*.
of evidence, danger of, 121; see *De bene esse; In perpetuam rei memoriam.*
of probate copy, or letters of administration, how supplied, 154 *b*.
of a record in the custody of the Law, 165 *f*; see *Answer, Bill, Fire, Record, Judgment.*
of a document, &c.; see *Bill, affidavit annexed to; Bond, Deed, Document, Register, Search, Secondary Evidence, Will.*
LOST DEED, all the executed parts to be accounted for, 273 *a*.
proveable by parol, although an attested copy exists, 268 *c*.
document, necessity for proof of its validity, and genuineness, prior to secondary evidence of its contents, 272.
instrument presumed (until the contrary be shewn) to be properly stamped, 391 *b*.
affidavit as to, to give jurisdiction, 539 *c*.
will, established by a copy, 186 *c*.
see *Depositions, Lost, Search.*
LOTTERY, public, books of, inspection of, 171 *h*.
LUCID INTERVALS, the necessity of proving, and how proved, as to persons proved insane, 233 *b*.
as to acts alleged to have been done during, 479 *c*; see *Insanity, Lunacy.*
LUNACY,
commission of, to prove insanity, 251.
inquisition by, 438.
presumption as to, 479 *c*.
see *Insanity, Lucid Intervals, Medical Men, Scientific Witnesses,* Semel &c.
LUNATIC, incompetent to testify, 330.
except *in lucidis intervallis*, 330 *d*; see *Lucid Intervals.*

MACHINE COPY of a Letter, use of, 273 *d*.
MADNESS; see *Insanity, Lucid Intervals, Lunacy, Lunatic, Medical Men.*
MADRAS, documents given in evidence at, 126 *a*.
examination of witnesses at, 116 *h*.

MAGNIFYING GLASS, use of, by witness, 267 *b*.
MAYHEM, or Maim, tried (at law) by inspection, 449.
MAHOMEDAN, witness such, how sworn, 65-6 *f*.
MAINTENANCE, witness not bound to admit, 83 *c*.
MAJESTY, Her, &c., estate or interest of, in suit to perpetuate testimony, 135.
see *King, Queen*.
MAGISTRATE, in America, 542 *c*.
of a Colony, certificate by, 254 *f*.
depositions before, 262 *d* ; see *Justices*.
in Moscow, 542 *c*. ; see *Oath abroad*.
MANOR, anciently part of another, 235 *g*.
books of, right to inspect, 171.
entries of presentments in, no evidence of ownership, 311 *b*.
recitals in, 167 *b*.
boundaries of, evidence of reputation to prove, 306 *g*.
use of a map to prove, 306 *g*.
Court, rolls of, evidence against lord and tenants, 167 *b*.
customs of, adduced to prove those of another, 235.
Lord of, rights of ; see *Manorial Custom, Coals, Timber, Waste, Wreck*, &c.
tenure in, proof of, 235 *i* ; see *Customs, Manorial*.
MANORIAL CUSTOMS,
in the North of England, 236 *b*.
RIGHTS, proof of, 235 ; see *Local Customs, Local Usage, Manor and Right*.
MANSFIELD, Lord, promoter of presumptions, 484.
MAP, an exhibit, 146 *a*.
use of, as evidence, of boundaries, 306 *g*.
of usage refused, 236 *e* ; see *Survey*.
MARINE AFFAIRS, as to evidence on, 445 *h*. ; see *Admiralty, Letters of Marque*, &c.
MARINES, wills of, since 1837, 183.
MARK, a witness, interrogatory to be framed so as to, 469, *ad finem*.
will attested by, 186 *c*.
to an affidavit, 543 *e*.
MARKSMAN, attesting witness being, and deceased, how his handwriting proved, 174 *b*.
attesting a will, 186 *c*.
cross of, proof of, 267 *c*.
must only mark, 543 *e*.
MARRIAGE,
attested by one witness, 159 *f*.
entry in parish register, as to, *ib*.
after birth of a bastard, declaration as to, to be made by parents, 323 *c*.
license, special, proof of, 253 *f*.
certificate as to, of the Town and Minister of Utrecht, 439 *d*.
cognizance as to, of the Spiritual Courts, and of the Temporal Courts, 440.
discussed and determined at Common Law, 441 *b*.
MARRIAGE—*continued*.
certificate of Ordinary to prove, 253
clandestine, in a case of, hearsay evidence and declaration not defective proof, 304 *a*.
evidence of reputation as to, 307 *e*.
what proof of, not sufficient, to satisfy the conscience of the Court, 307 *e*.
not proveable by Letters of Administration, 444.
evidence of no, sentence in Spiritual Court, 442 *b*.
reputation and cohabitation as proof of, 253 *f*.
Jactitation of, suit of, 440, *et seq*.
presumption of, 485.
sentences of the Ecclesiastical Courts as to, 440, *et seq*.
testimony of parties to invalidate their own, suspicious, 384-5 *a*.
Act, contravention of, charge of, answering as to, 84 *e*.
proof of; see *Bibles, Prayer Books, &c., Registers*.
second ; see *Death, Husband, Wife*.
of a woman, by the Common Law, held to countermand her Will, 301 *a*.
of a man, prior to 1838, when operated as a revocation of his will, 300, *et seq*.
since 1837, operates as a revocation of wills, in general, 300 *e*.
portion ; see *Ademption of Legacy, Advancement, Portion*.
abroad :—at Barbadoes, Edinburgh, Paris, 167 *f*.
in Ireland, register of, not duly kept, other evidence, 307 *e*.
in Scotland, proof of, 307 *e*.
after 1st March, 1837, solemnized, contracted, or registered only, 307 *e*.
incestuous, &c., how far voidable, and how far void, by stat. 5 & 6 Wm. 4, c. 54, 83 *a*. 167 *f*. ; see *Bastard, Bastardize, Issue, Parents, Parish Registers*.
MARRIED, never having been, proof of, by hearsay evidence, 320 *d*.
woman, examination of, apart from her husband, 494 *b*. ; see *Feme Covert, Husband, Wife*.
MARSHAL OF THE HOST, certificate of, 253 *d*.
MASTER, application to, respecting a commission to examine witnesses, when parties disagree, 96.
his duties, *ib*.
his jurisdiction, *ib*.
see *Commission to Examine Witnesses*.
Reference to, 501, *et seq*.
special direction as to evidence on, 195.
as to loss or destruction of a document, 272 *c*.
to distinguish what parts of depositions in cross-cause related to matters in the cause, 220 *c*.
to draw up a Case, 530 *b* ; see *Law*.
as to an alleged piracy of copyright, 454, 455 *a*.
as to matters of account, 513, *et seq*.

MASTER—*continued.*
right of, to examine, foundation of, 502 *a*.
an officer of the Court, delegated (on a Reference), to look into the proofs, 503 *c*.
certificate by, as to practice, 401.
certificate of, for a commission, 502 *a*.; see *Commission to examine Witnesses.*
interrogatories settled by, 514.
modes of presenting evidence to, 505.
judicial cognizance of, 505 *d*.
inspection by, 505 *f*.
may act upon Admission and Waivers, 505 *g*; see *Admission and Waivers.*
power of, to examine witnesses *vivâ voce*, 507 *d*.
discretion of, as to examining witnesses *vivâ voce*, exercise of, 507 *d*.
may, if he pleases, examine witnesses after a decree, 509.
Clerk of, practice to examine before, can never be proper, 509 *b*.
discretion of, as to production and inspection of documents, 510 *b*.
not having declared at first that affidavits should be used, not to resort to that method, 511-12 *a*.
affidavits which may be used before, Orders as to, 512.
on inquiry before, affidavits in reply, and further, Order as to, 512 *d*.
affidavits used in office of, to be filed, 512 *f*.
caution to, in taking or admitting affidavits, 541 *b*.
power of, to examine, *vivâ voce*, witness, creditor, &c., Order as to, 498 *e*.
direction that, "be at liberty to examine witnesses already examined, and on the same points," varied, 203 *a*.
minute book of, entry in, 505 *h*.
practice before, 490 *a*.
practice of, as to examination of witnesses, 508-9.
preliminary accounts and inquiries before, 489, 490.
his receipt for a deed, not evidence, as to its contents, 271 *c*.
may, without order, inquire as to scandal, impertinency, or insufficiency, in matters before him, and proceed to remedy the same, 513 *e*.
not to receive further evidence as to any matter depending before him, after issuing the warrant on preparing his report, 522 *a*.
reports by, early, where kept, and from what period, 151.
signed by him, filed and kept at the Report Office, 152 *d* and *e*.
onus of supporting, lies on the person in whose favour it is made, 390 *d*.
subpœna to testify before, form of, 493 *b*.
special jurisdiction of, under the stat. 3 & 4 Wm. 4, c. 94, s. 13, 137 *f*, 138.
(under an ancient order) to open commissions to examine *de bene esse*, or *in perpetuam rei memoriam*, 142 *b*.

MASTER—*continued.*
illness of, warranting application to the Court, 137 *f*.
permanently incapacitated, cause may be referred to the Master in rotation, with liberty to him to adopt the proceedings already had, 522 *b*.
power of, to administer oaths, 541 *c*.
See *Accounts, Certificate by, Debtor and Creditor, Exceptions, Facts, Inquiries, Interrogatories to be settled by, Matters of Fact admitted before, Preliminary Inquiries, Reference to, Report of, State of Facts.*
IN ORDINARY (new practice), authorised and required to administer the oaths to commissioners for examining witnesses, 100 *a*.
EXTRAORDINARY, (not employed nor concerned in the cause,) authorized and required to administer oaths to commissioners for examining witnesses, 100 *a*.
may administer oath, requisites, 541; see *Affidavits.*
in Ireland, authority recognised here, 541 *g*.
in Ireland and Scotland, Act to empower the Chancellor to appoint, 542-3.
in Scotland and Ireland, fees of, 542-3.
in matters relating to, Master of the Rolls consulted, &c., 530 *c*.
OF THE QUEEN'S BENCH, signature of, 164 *d*.
OF THE ROLLS, cases sent by, to Courts of Law, they will now certify on, 531.
duties of, imposed by late statute, 531 *f*.
appeal from, to the Chancellor, 536 *c*.
taken to the assistance of the Lord Chancellor, on a question as to one of the Masters, 530 *c*.
is a Judge of the Court of Chancery, judicial notice taken of that fact, by the Court of Queen's Bench, 396 *c*.
who is, or his signature, notice taken of, 396 *b*.
see *Appeal, Judge, who directed an Issue.*
OF THE TRINITY HOUSE; see *Admiralty.*
MATERIAL FACTS, lying in the knowledge of a single witness, 121 *h*, 122 *e*; and see *De bene esse.*
ALLEGATIONS IN THE PLEADINGS, 242 *d*; see *Immaterial Matters; Immateriality.*
MATERIALITY, of the fact falsely sworn to, necessary to render the perjured witness indictable, for perjury, 207.
test of, 20; see *Impertinence; Scandal.*
MATRICULATION; see *Universities, Books of.*
MATTERS OF ACCOUNT, evidence as to, ought not to be entered into, at all, before the hearing, 503 *d*.
MATTERS ADMITTED, in the pleadings, or otherwise, evidence as to, impertinent; see *Admissions, Circumstances, Deeds, Facts, Immaterial, Impertinence, Material, Matters of Fact, Pertinent, Scandal.*

MATTERS—*continued.*
depending before the Court, any, scandal or impertinence in, 215 *d.*
OF FACT admitted or agreed to, before the Master, Order as to, 505 *h*; see *Issue.*
Inquiries, as to, before the Master, 513, *et seq.*; see *Master.*
OF LAW; see *Case, Issue, Law, Text Books, Trial.*
PUT IN ISSUE, not in issue before, not entered into on a rehearing, 536 *e.*
as to which evidence has been entered into on the original bill, no new evidence as to, on a supplemental bill, 537 *e.*
on a rehearing, 537.
OF RECORD, 408 *c.*
VARIOUS, proving of, deferred, until a decree made, 503 *d*; see *Matters of Account.*
MAXIMS of Law, as to presumption, 474, *et seq.*
MAYOR,
of Bristol, seal of, admission of, 410 *c.*
of London, Lord; see *London.*
of a Town in France, certificate of, 253 *d.* see *Corporation, Marriage.*
MEANING OF WORDS, reference to dictionaries to ascertain, 397 *b.*
MEDICAL ATTENDANT, of a witness, alleged to be sick, oath of, required, 250.
CERTIFICATE, affidavit of a surgeon to entitle a party to examine a witness *de bene esse*, 121 *d.*
MAN, affidavit by, of the illness of a witness, 255.
EVIDENCE admissible in the Ecclesiastical Courts, *viz.*, conclusions and opinions, 470 *a.*
MEN, the evidence of, as to sanity, and the mere opinion of such, 233 *b*; see *Insanity, Lucid Intervals, Lunacy.*
what questions may be asked of, on a question of insanity of the accused in Criminal Courts, 470 *a.*
see *Physicians; Scientific Witnesses; Surgeons.*
MEDICINES, as to, information of others, relied on by the Judge, 455, *ad finem.*
PATENT; see *Infringement; Injunction.*
MEMBER OF PARLIAMENT, as a witness, not allowed to disclose proceedings in Parliament, 86 *d.*
MEMORANDUM, entry in book, by one since deceased, merely by way of, no evidence, 310 *b*, 311 *c, d*, and *e.*
see *Registers, Non-Parochial (so called).*
MEMORIAL of a conveyance in Middlesex, 419 *c*; see *Attested Copy, Middlesex, Register, York.*
MEMORIALIZATION of a deed, used as secondary evidence, 271 *a.*
MEMORIAM, 129; see *In perpetuam rei Memoriam.*
MEMORY,
of a witness, circumstances brought to, after his examination, when, and why the Court may allow him to be examined again, 202 *c.*
of Defendant impaired by age, 29, and n. *c.*
of an aged and infirm witness not to be refreshed by a third party, whilst the examiner examines him, 67 *e.*
of a witness, as to refreshing, 220 *h.*
of a witness, at law, what means he may use to refresh, 67 *e.*
of attesting witness to a deed as to refreshing, 174 *a*; see *Judge.*
MERCANTILE terms; see *Technical Words, Trade, Custom of Merchants.*
MERCHANT; see *Clerk, deceased, entry by.*
accounts of, read as charge, readable as discharge, 468.
letter book of, entries in, 310 *b*; see *Custom or Usage of Merchants.*
MERE TRUSTEE, although a party defendant, order for examination of, as a witness, at a trial at law, 525 *f.*
MERITS, inclination of the Court of Equity, to sift, 230.
MIDDLESEX Registry, Act for, 157 *a*; see *Memorial, Register, Statutes.*
MICROSCOPE, use of, by a witness, 267 *b.*
MILITARY COURT OF INQUIRY, report of, not admissible in evidence, 86-7 *a.*
MIND; see *Insane, Lucid Intervals, Lunatic, Lunacy, Mad, Sane, Sound, Unsound.*
MINERALS, right of Lord (of the Manor) to, evidence of reputation as to, 306 *b.*
MINING, terms relative to; see *Technical Terms.*
MINISTER of the British Chapel at Moscow, 542 *c*; see *Marriage, Registers.*
MINOR, since 1837, not competent as a testator, 182.
production of, by guardians, 450 *b.*
see *Infant.*
MINUTE; see *Designation; Evidence, Minute of.*
BOOK of registrar, exhibits and depositions put down in, 533; see *Master, Minute Book of.*
MINUTENESS OF INTEREST, 364.
MINUTES OF DECREE, short copy of, 533.
MISBEHAVIOUR,
of commissioner, 108 *c.*
of a witness, 108 *d.*
or misconduct; see *Wife.*
MISCALLING of a person, by a testator, how explained and set right, 283-4.
MISCONDUCT of the heir-at-law, effect of, 184 *d.*
MISDEMEANORS, convictions of, 433 *d*; see *Criminal Matter.*
penalties of, substituted for the moral sanction of an oath, by the stat. 5 & 6 Wm. 4, 540 *h.*

MISDIRECTIONS of the Judge at Law, not heeded by the Judge in Equity, 528.
(alleged) of the Judge who tried an issue, proper course in case of, 529 *a*.
MISNOMER; see *Name; Nicknams.*
MISSTATEMENTS in a bill, 16 *e*, 151 *a*; see *Suggestions.*
in a bill, proved untrue, 15 *b*.
MISTAKE,
witness alleging he had made, yet no new commission issued, 105 *d*.
of a witness, rectification of, 106 *a*.
of a party, in taking depositions of the other party out of the office, effect of, 138 *c*.
leave to file a supplemental bill to rectify, 196 *c*; see *Accident, Diligence, Fraud, Inadvertence, Laches, Omissions.*
in transmission, by post, of depositions taken under a commission, 120 *d*.
of persons drawing deeds, &c., evidence to rectify, 289.
in not entering proofs as read, method of rectifying, 534.
in an examination of a party, (as a party,) a supplemental examination to correct, 518 *c*.
in a will, evidence to correct, refused, 289 *f*.
acting under, how binding, 282 *a*; see *Errors, Examiners, &c.*
MITTIMUS, use of, to send a Record of one Court to another, 412.
MODE of examination, (in the Court of Chancery,) by Lord Erskine, said to be frail and imperfect, 496 *b*; and see 498 *d*.
report of commissioners as to, 496-7.
MODEL, an exhibit, 146 *a*.
MODELS, use of, in cases of alleged infringement of patent rights, 455.
MODERN usage; see *Usage.*
MODUS DECIMANDI, claims of, statutes as to, 476 *c*.
which pervades a whole parish, or affects a particular farm only, 306 *h*, 307 *a*.
decree as to, 423 *b*.
effect of, 424 *b*.
issue to try the validity of, almost of course, 523 *f*.
plea of, not supported by evidence of a composition real, 232 *c*.
reputation as to, evidence of, 306 *h*.
strictly proved in the Exchequer, 242 *c*.
but rule relaxed of late years, *ib*.
and as to practice in Chancery, 243 *a*.
terriers alone insufficient to prove, 312 *e*.
verdict as to validity of, 423 *a*.
what not proof of; but might be of a composition, 236 *d*.
MONASTERIES, statute for the dissolution of, recital in the preamble to, 399 *c*.
MONASTICON, Dugdale's, not evidence, 398 *f*.
MONASTIC ORDERS; see *Tithes, exemption from.*
MONASTIC RECORDS and other documents, 169 *c*.
MONEY RAISING, communications with an attorney as to, privileged, 388 *e*; see *Scrivener, Solicitor.*
MONUMENT, destruction of, 269-70.
inscription on, how proved by copy, and why, 149.
inscription on, evidence, as to pedigree matters, 318-19 *a*.
being destroyed, secondary evidence of, 319 *a*.
MORAVIAN, solemn affirmation by a witness being such, 65-6 *f*.
affirmations by, in lieu of oath, 332 *e*.
MORTGAGE, deed is *primâ facie* evidence of, 176 *c*.
equitable, proof of deed deposited, 272 *f*; see *Equitable.*
money, payment of, to deceased attorney of mortgagee, proof of, 464 *c*.
reference as to, under stat. 7 Geo. 2, c. 30, must proceed on an admission of the principal and interest due, 503 *e*.
of wife's estate, her declarations as to, 315 *a*.
MORTGAGEE, undisturbed possession by, for twenty years, presumption raised by, 476 *b*.
one claiming to be, prior to plaintiff's right, ordered to be examined *pro interesse suo*, &c., 519 *c*.
MORTIS CAUSA; see *Donatio mortis causa.*
MOSCOW, affidavit at, 542 *c*.
MOTHER; see *Bastard, Parents, Relative.*
MOTION
to add interrogatories; see *Interrogatories.*
to advance a cause, notice of, affidavits of, 545 *d*.
for a commission, to take a defendant's examination, time left to the Master, 518 *a*.
to discharge an order, for a commission granted on a Master's certificate, 509 *e*.
as to impertinence, not being scandal, in depositions or interrogatories, to be postponed until the hearing, 230 *b*.
as to an issue, form of, &c. 524.
that an issue be sent to a particular Court of Law, 524 *c*.
to have an issue taken *pro confesso*, 525 *c*.
for leave to enter into evidence, to supply defects or omissions of evidence, 194, 197-8-9.
for leave to exhibit interrogatories, to falsify an examination of one *pro interesse suo*, of course, 520.
to produce documents referred to in an affidavit, refused, 30 *a*.
for the re-examination of witnesses, 507 *b*.
to re-examine a witness, necessary; but to re-examine a party, not necessary, 518.

MOTION—*continued.*
special, to be allowed to examine witnesses on Articles to discredit a witness, 205; see *Affidavits.*
to suppress depositions, for irregularity, too late after exhibiting Articles to discredit, 205 *e*; see *Laches, Parties.*
affidavits used in support of, 538 *b.*
MOURNING RINGS; see *Rings, inscriptions on.*
MURDER; see *Homicide.*
MUSIC, copyright as to, piracy of, 454.
MUTILATION of a document, 276 *a*; see *Destruction, Loss, Objection.*

NATURAL CHILDREN, trust for, imperfectly expressed in will, yet enforced, 292 *b.*
"NATURAL DAUGHTER," meant by the word "daughter," presumption raised and rebutted, 284 *b.*
NAME, ambiguity as to, 279 *b.*
difficulty as to, 279 *a.*
as to, latent ambiguity, arising from the existence of two of one name, 286 *b.*
mistake as to, in a will, extrinsic and parol evidence to explain, 283-4.
&c., of a witness, note of, handed to the commissioner, 104 *h.*
to be delivered to the other side, 469 *b.*
NATURE, course of, taken notice of, 306 *b.*
NAUTICAL practice and experience, as to matters of; see *Admiralty, Trinity House, Masters of.*
terms; see *Technical terms.*
NAVIGATION, right of, evidence of reputation as to, 305 *e.*
NECESSITY, when an answer to the objection for incompetency, 367-8.
NE EXEAT REGNO, evidence on application for a writ of, 478 *b.*
NEGATIVE, evidence to prove, objection to, 387-8.
pregnant; see *Answer, particularity of.*
proof, (species of) allowed before the Master, 510; see *Advertisements.*
NEGLIGENCE may preclude a party from having relief, 196 *b.*
not to be presumed, 480.
see *Laches.*
NEPHEW OR NIECE; see *Relative.*
NEW COMMISSIONS, 127.
new practice as to, 128.
see *Commissions.*
EVIDENCE; to supply defects or omissions, 197-8-9.
discovery of, ground for a rehearing, 199 *f.*
may be received, on a rehearing, upon special application, 199 *e.*
on a rehearing, 536.
Costs of, 537 *b.*
see *Re-Examinaton, Supplemental Bill, Matters in issue.*
INTERROGATORIES, filed without order, but must have leave to exhibit, 106 *f.*

NEW TRIAL of an issue, (directed by the Court,) rules for granting, 528.
motion for, before the same Judge, 528, *c* and *d.*
and a Commission, order for, laches in proceeding with the latter, effect of, 529 *a.*
applications for appeals on, 529.
see *Appeal, Issue.*
NEWSPAPERS, affidavits or affirmations as to, 155-6; see *Advertisements, Gazette.*
NEXT-OF-KIN, advertisements for, 510.
presumption in favour of, as to the undisposed of residues of personal estate of persons dying before September, 1830, 294 *c*; see *Presumption.*
NEXT OF KINSHIP; see *Kinship.*
NICK-NAME of a legatee in a will, how explained, by parol, 279 *e*; see *Name.*
NISI PRIUS record, when no judgment had been signed, inadmissible, 434 *d.*
trial at, use of exhibits at, 192.
admissions for former, revivable on new, notwithstanding notice to the contrary, 457 *c*; see *Affidavit used, Record.*
NOBILITY; see *Dignity, Dowagers; Peerage, privilege of; Perpetuation of Testimony.*
NOMINATION, of Commissioners, by the Master, 97 *b.*
NONAGE, tried (at law) by inspection, 449 *b.*
NON-EXISTENCE of certain persons assumed, on their not answering advertisements, 510-11 *a.*
NON PAROCHIAL Registers, certain memorandum books, so called, 167 *f.*
use of, as evidence, in pedigree cases, 316 *h*; but see *Stat.* 3 & 4 *Vict. c.* 92.
NON RECONCILIATION between husband and wife, proof of, 442.
NON RESIDENCE, action for, evidence in, 463 *f.*
NOTARY PUBLIC, how certified, so to be, 254 *a.*
has credit everywhere, 254 *b.*
British Consul empowered to act as, 254 *f.*
authorized to take and receive statutory declarations, 460-1.
affidavit sworn before, 542 *e.*
clerk of, since deceased, entry in book by, 309 *g.*
charter party in book of, proved by a copy, 149 *c.*
employed to translate Foreign depositions into English, 119 *d.*
powers of Consul to act as, 541 *f.*
NOTE, proof of, 109 *d*; see *Bank Note, Bill, I. O. U., Letter, Receipt, Stamp.*
of name and place of abode of witness, Orders for delivery of, 104 *h*, 469 *b, c.*
testimony to invalidate, 385; see *Bill, Drawer, Indorser.*
NOTES of the Judge who tried an issue, sent for by the Judge in Equity, 528 *a.*

NOTICE,
letter of a party, evidence for himself as, 187 *c*.
to adverse party, to produce a document admitted, or proved, to be in his possession, 273 *b*, *c*, and *d*.
allegation of, in bill, to be particular, 388 *b*.
if answer states a purchase for a valuable consideration without, plaintiff to prove notice, 389 *a*.
of execution of a commission (old practice) in computation of the number of days, Sunday excluded, 93 *a*.
of time and place, when and where a commissioner will proceed to examine witnesses, 100-1 *a*.
service of, *ib*.
judicial, taken of whatever ought to be generally known within the jurisdiction, 396 *b*; see *Cognizance, Notice, Motion, Judicial*.
to produce; see *Party, Production*.
NUL TIEL RECORD, process on, plea of, 412.
NUMBER OF WITNESSES in Cases of Contempt, 545 *d*; see *Single Testimony*.

OATHS, all such to be administered "reverently and according to law," 65-6-7 *b*.
administered by the Examiner to every witness, 65.
although a peer even, *ib*. *d*.
Jews, Turks, Infidels, Heretics, &c. how each sworn, 65-6 *f*.
but none will bind an Atheist, *ib*.; see *Atheist*.
when the form only is objected to, may still be administered, in another binding form, 65-6 *f*.
when may be administered, as an affirmation, 65-6 *f*.
when cannot be administered, *ib*.
"administered in such form and with such ceremonies as," each "person may declare to be binding,"—is to be held binding, 65-6-7 *f*.
formerly administered upon the Evangelists, 322 *d*.
form of, such as the witness is supposed to consider most binding on his conscience, 333 *a*.
how far differ from a declaration or an affirmation, 540 *h*.
declaration in lieu of, 540 *h*.
the general form of, administered to a witness, tacitly reserves all legal exemptions, 378 *d*.
of Commissioners and Clerks, old practice, forms of, 92.
why recommended by C. B. Gilbert, *ib*. *b*.
to be administered by Commissioners to examine witnesses, 98.
to be taken by Commissioner, 98-9.
Clerk, 98-9, 100.
of Commissioner, when and by whom to be administered, 100 *a*.
of Clerk to Commissioner, when and by whom to be administered, 100 *b*.

OATHS—*continued*.
of a witness, how to be taken by a Commissioner, 98 *d*.
administered to a witness by a Commissioner, 104 *c*.
of witness, examined by Commissioner, repeated to each set of interrogatories, 104 *c*.
as to carriage of examinations or depositions of witnesses, &c., 110 *f*.
of Interpreters, 119 *b*.
in cases of contempt, administered in open Court, 494.
authority to administer, 541.
all, to be reverently administered and taken, Orders, 541 *b*.
abroad, intervention of a proper magistrate, if necessary by the law of the country, 542 *c*.
of a peer, to an answer to a cross-bill, 65 *f*.
whether witness would believe such an one on, may be asked, but ground of the opinion must not be asked, 207.
see *Clerk of Affidavits, Clerk of Enrolments, Clerk of Records and Writs, Credibility, Misdemeanor, Moravians, Quakers, Separatist, Testimony of Witness*.
Act for the suppression of extra judicial; see *Statutory Declarations*.
"OATH *against* OATH," where there is, rule that plaintiff has no decree on that fact, 227; see *Single Witness*.
OBJECTING, not; see *Acquiescence*.
TO ANSWER, no admission of guilt, 83.
TO EVIDENCE, which could not be reserved till the hearing, 220 *c*.
at the hearing,
on grounds peculiar to Equity, 226, *et seq*.
on grounds common to Equity and to Law, 229, *et seq*.
on other grounds, 387, *et seq*.
see *Affirmative, Cross-Examination, &c*.
waivers of, 48.
waived by other side to avoid appearance of captiousness, 500 *a*.
TO INTERROGATORIES, settled by the Master, 520.
TO MASTER'S CERTIFICATE; see *Exceptions*.
TO MASTER'S REPORT, as to scandal, &c. 217; see *Exceptions; Report*.
OBLITERATION, in a will, since 1837, 452 *d*.
OBNOXIOUS QUESTIONS to a Witness, not prevented by the Court, 83 *h*.
OCCUPANT; see *Declarations by*.
ODIOSA ET INHONESTA NON SUNT IN LEGE PRÆSUMANDA, 474.
ODIUM SPOLIATORIS induces the Court to admit slight evidence and presumptions, 269 *c*; see *In, &c.; Spoliation*.
OFFER; see *Advantageous Offer*.
OFFICE, claim to, bill to perpetuate testimony as to, 134-5.
that a person duly executes, is to be presumed, 389 *c*.
COPY, of a bill in Chancery, use of at Law, 150 *f*.

OFFICE COPY—*continued.*
of proceedings in Chancery, 152.
in the Court of Chancery Ireland, 150*f*.
in the cause, equivalent to the record, 158 *b*.
when sufficient without original, 158 *b*.
of a bill, not on the file, 158.
when record cannot be found, 165 *a*, *et vide infra*, 228 *d*.
officer examined to prove, 189 *b*.
of depositions, want of signature to, 226 *a*.
how far proof in another proceeding, 259 *a*.
objection to, that the original is not to be found among the records, 228 *d*.
withheld by another party, no excuse for using the draft, 274 *b*.
of an affidavit, the only evidence of its filing, 544 *a*.
see *Copy*.
OFFICER, by law authorized to administer an oath, authorized to take and receive statutory declarations, 460-1.
of a company, filing a bill of interpleader, affidavit by, 538*f*.
of the Court, not being Masters, judicial discretion delegated to, 538 *d*.
satisfaction of, by affidavit, *ib*.
certificate of, as to practice, 401.
see *Clerks, Masters, Registrars*.
OFFICES; see *Augmentation, Crown, Duchy, Remembrancer's, Revenue, Six Clerks', Stamp*.
OFFICIAL CHARACTER,
Act dispensing with proof of, in certain cases, 157-8.
see *Stat.* 8 & 9 *Vict. c.* 113.—157.
examination as to, 189 *h*.
proof of person holding, 190 *b*.
evidence of, as to a magistrate, in a colony, 254 *b*.
see *Consul; Notary; Judge; Minister*.
COMMUNICATIONS, of a public and particular nature, 377 *d*.
AND OTHER DOCUMENTS, Act to facilitate admission of, in evidence, 157.
receivable in evidence, by any Act of Parliament, 158.
copies of certain such, made evidence by Act of Parliament, 190 *b* and *c*.
see *Stat.* 8 & 9 *Vict. c.* 113.
SIGNATURE, proof of, 264 *d*.
SITUATION, person in, yet copy signed by, not evidence, 159.
see *Judge*.
OLD ORDERS OF THE COURT,
why some set forth in this edition, 54 *b*, 88 *a*; see *Orders of the Court*, 62 *c*.
OMISSIONS TO PROVE, relief in cases of, 196.
special cases of, leave given to supply, 197-8-9.
IN WRITTEN DOCUMENTS of a name, or other material word, may not be supplied by extrinsic evidence, 277 *b*.
by mistake or fraud, in written agreement, parol evidence to supply, not available by plaintiff as by defendant, in suit for specific performance, 291 *c*.
OMNIA PRÆSUMUNTUR RITE ET SOLEMNITER ACTA, maxim, 480.
ONUS PROBANDI,
of an instrument, 246 *a*.
of a right, *ib*.
on the party affirming, 388-9.
in pedigree cases, 389-90.
effect of *primâ facie* evidence to shift, 390 *a*.
see *Undue Advantage and Influence*.
OPINION,
OF A COURT OF COMMON LAW, as to matter of fact; see *Issue of Fact*.
matter of law; see *Case, Certificate*.
not obtainable as to speculative questions, or upon the construction of equitable interests, 531 *h* and *i*.
OF FOREIGN LAWYERS, as to Foreign Law, 447-8.
OF SCIENTIFIC MEN, evidence as to, 470 *a*.
OF WITNESSES, as to weight due to, when, and when not, professional men, 233 *b*.
as to handwriting, not evidence, 266.
see *Belief, Medical and other Professional and Scientific Witnesses*.
ORAL DECLARATIONS; see *Declarations; Hearsay*.
EXAMINATIONS, want of, in Chancery, observations of the Chancery Commissioners as to, 496-7; see *Viva Voce*.
of Ld. Erskine, C., as to, 496 *b*.
see *of* B. *Alderson*.
ORDER,
for taking an Account, 514; see *Accounts and Inquiries; Decree*.
for a Case to be sent to a Court of Law, 531.
for a Commission to examine witnesses abroad, form of, 118.
see *Decree, Interlocutory*.
for an Issue, common form of, 523-4.
Judge's signature to, judicial notice of, 413 *h*.
on a Reference, as to evidence, 504; see *Prospective; Special Order*.
on a Reference made under, the Master has the same power as on one under a Decree, 502 *b*.
for setting down appeals, 545 *d*.
what copy of, evidence, 156 *a* and *b*; see *Insolvent Acts; Official and other Documents*.
IN COUNCIL, copy of, in Gazette, 400 *b*.
ORDERS OF THE COURT, as to the collection of, by Mr. Sanders.—Preface xii.
old, as to the examination of witnesses, "in perpetual memorye," 129.
ancient, why here referred to, 54 *b*, 62 *c*, 88 *a*.
modern; those of May 1845, 88 *a*.
ORDINANCES,
use of, as evidence, in tithe suits, 312 *e*.
ORDINARY, certificate of, 253 *f*.
reference to, for certificate as to marriage, 440.
seal of, 443; see *Administration; Probate*.
ORDINARY INQUIRIES, on a reference, for the sake of convenience, 503.
ORIGINAL BILL; see *Review, Supplemental*.

ORIGINAL DEPOSITIONS,
in a Chancery suit, not necessary in Civil proceedings at Law, 153 *a*.
see *Depositions, Office Copies.*
PROCEEDINGS IN BANKRUPTCY, produced on a trial at Law, 153 *a*.
OWNER; see *Steward.*
OWNERSHIP, presumptions as to, 474 *d*; see *Acts of Ownership, Declarations by Occupant, &c.*

PAINS AND PENALTIES, witness not bound to subject himself to, 80.
PAPER, prepared, of answers advised to be made by a defendant under examination, after a third insufficient answer, 211 *c*.
prepared for a witness, 220 *h*.
see *Documents; Document, Production of; Memory; Witness.*
PAPIST, witness being, formerly not bound to admit it, 83 *b*.
plaintiff being, (when irrelevant,) not allowed to be proved, 231 *c*.
issue to try whether a person was or was not, 492 *c*; see *Baptism, Missal, Prayer Books, Priests, Roman Catholic Prayer Books.*
PARCELS,
admissions by recital of, description of, 462 *b*.
description of, in leases, by churchwardens, 479 *b*.
PARCHMENT, engrossment of depositions, taken by commissioner, must be on, 170 *a*.
all Records ought to be on, 159 *f*.
PARDON, the effect of, 334.
PARENT, legacy from, to a child, ademption of, by a portion, 297-8; see *Ademption, Person, in loco parentis; Portion.*
of a bastard *eigné*, attested declaration in writing by, 323 *b*; see *Bastard, Illegitimate.*
restricted in their testimony, as to bastardy of issue after marriage, 384.
and children; see *Relative.*
PARIS, marriage at, of British subject, 167 *f*.
PARISH BOOK, entry in, by sexton, of fee received in course of his duty, 309 *g*.
entry in, 310 *b*.
entry in, of a payment, parol evidence to explain, 276 *c*.
right of access to, and inspection of, 171 *d* and *e*.
see *Parish Registers; Registers.*
PARISH,
boundaries of, use of a map to prove, 306 *g*.
evidence of reputation to prove, *ib*.
Church, lands of the; see *Parcels.*
consent of, to a suit by the churchwardens, proof of, 478 *f*.
custom in one, adduced to prove custom in another, 236 *c*; see *Customs, Parochial.*
division of, not proveable by *Gazette*, 400 *l*.
lands vested in the churchwardens, 479 *b*.
overseers' accounts, as evidence in tithe suits, 312 *e*.
PARISH—*continued.*
property, leases used, as evidence of lands being, 311 *a*.
primâ facie evidence of lands being, 479 *b*.
in which, property is, presumption as to, *ib*.
REGISTERS, as to custody of, 167 *f*.
in case of loss or destruction of, copies of, in the Bishop's register, *ib*.
right to inspect, 170 *a*.
examined copies of, 167 *f*
but originals used in Peerage cases, *ib*.
see *Non Parochial Registers.*
PARISHIONERS,
who vote in the election of a minister, 281 *c*.
rated, declarations by, how far admissions, 463 *c*.
PARLIAMENT,
proceedings in, not to be disclosed, 86 *d*.
Act of, effect of usage to interpret, 281 *d*.
inrolment of, 404.
Clerk of, his duties, 404 *b*, *c*, and *d*.
Courts take notice of the commencement, session, and prorogation of, 401.
Lord of; see *Bishop; Dowager; Member of; Peer.*
printer to either House of, copies of journals purporting to be printed by, 148-9.
journals of either House of, copies of, 149; see *Acts of, and Statutes;* and see *Ireland, Statutes of.*
PAROCHIAL,
Customs, proof of, 236.
right; see *Local Customs and Usage.*
Registers being lost, use of, copies in Bishops' Registry, 268 *c*.
see *Parish Registers.*
see *Parish and Right.*
PAROL EVIDENCE,
as distinguished from secondary evidence, 248; see *Extrinsic Evidence.*
when admitted to affect, explain or supply, defects in, or want of, written evidence of agreements, &c, 276 *et seq.*
as to matters whereof writing is the proper evidence, when admissible as secondary, when not admissible as extrinsic, 277 *a*.
to explain a will, admissibility of, early cases as to, 282 *c*.
to rebut or support, but not to raise a presumption, 294 *b*.
as to legacies by strangers being ademed, Mr. Roper's opinion, 299, 300.
coupled with a will, might be sufficient to rebut a presumption stronger than the written will, 303 *b*.
of facts; see *Facts.*
of admissions; see *Admission, Agreement; Specific Performance, Suit for.*
PARSON, proof of defendant being, in an action for non-residence, 463 *f*.
receipt by, for tithes, evidence for successor, 311 *f*.
right of admission of, by payment of tithes, effect of, 463 *c*; see *Rector, Vicar, Tithes.*
PARTIAL ADMISSIONS, 23; see *Admissions.*

PART PERFORMANCE of an agreement sought to be altered, 291 *e*; see *Agreement; Performance, Specific; Written.*
PARTICULAR instances may be proved, to support general allegations, if sufficiently alluded to, 233.
PARTIES: see *Party.*
to an agreement in writing, parol evidence as to conduct of, 282 *b*.
to suits, the sole right to use depositions in them, and why, 259-60.
liberty of, to examine the others, as witnesses, 525 *f*.
motion to be allowed to examine, 338 *b*.
suggesting absence of interest, and saving all just exceptions, *ib. d*.
when interested, incompetency of, 337.
when not interested or formal, not incompetent, 338.
substantially though not nominally, incompetency of, 372.
order for the examination of, in an order for a reference, or the direction of an issue, 341.
as to production by, and examination of, directions, in an order of reference to a Master, 501.
entitled to attend, on a reference, 502.
all, for whose benefit an examination of a party before a Master has taken place, to have the benefit of it, 516-17; see *Settling Interrogatories.*
accounting before the Master, to bring in their accounts in the form of Dr. and Cr., 514-15.
to be examined on the trial of an issue directed, 525-6.
or persons not being parties to the suit, documents in possession of, 273-4; see *Declarations by; Inhabitants; Joint and Several Demand; Landlord; Parson, Parishioners; Party.*
between the same; see *Judgment, Verdict.*
PARTITION COMMISSIONERS, named in a commission, may examine witnesses *ore tenus*, or in writing, 498 *e*.
PARTY,
to see a witness, to inquire what he can depose to, 221 *i*.
at law, cannot examine his own witness on a *voire dire*, 329 *b*.
letter by, evidence for himself at law, as notice or demanding, 187 *c*.
notice to produce a document, proved to be in possession of, 273 *d*.
husband or wife of, how far and why cannot be examined, 341 *et seq.*
counsel not agent of, 458.
bound by the acts and declarations of his counsel, 458-9.
bound by his own admission, and not permitted to contradict it, 465 *a*.
to a suit, &c., not rendered competent as a witness, by the Act for Improving the Law of Evidence, 327 *a*.
may be examined before the Master, 506 *b*.
PARTY—*continued.*
ordered, but refusing to be examined, on a reference, 512 *f*.
for examination of, in taking accounts, when a special order is requisite, 515.
being directed by the decree to be examined, Master to settle the interrogatories, 516 *a*; see *Settling Interrogatories.*
examination of, may be at several times, 517 *d*.
examination of, same as answers, 518 *d*.
before the Master, whether, when, and how often, is left to his judgment, nor is a new order necessary, 518.
depositions of, as a party, and not as a witness, like the pleadings, can be read against himself only, 518; see *Act by adverse, letting in less evidence,* 273 *b*; *Admissions by, Detention of document by, Parties.*
PARTNER, admissions by, against others, 464 *b*.
newly admitted, admission by, not available against old ones, 465 *d*.
admission of, in an answer, read at law against another partner, as an admission, 468 *c*.
answer of, when read against co-partner, 29.
use of, 464 *b*.
being defendant, what discovery enforced; 24 *d*.
a defendant being alleged, to hinder his discovering, 24 *d*.
competency of, a case as to, 360; see *Copartner, as to competency of.*
PARTNERSHIP, what sufficient evidence of, to ground a decree for an account, 271 *b*; see *Copartner, Gazette, Partner.*
PARTNERSHIP ACCOUNTS, a suit for, 501 *a*.
taken before the Master, special directions (in one case), 514 *e*.
PASS, when publication to (new practice), 136; see *Publication.*
PATENT, H. M. Letters, may be enrolled in Courts of Record, and exemplified, 415 *a*.
of peerage, recital of, in Journals of the House of Lords, use of, 150 *a*.
See *Exemplification.*
RIGHT, infringement of, 455.
see *Letters Patent.*
PATER EST QUEM NUPTIÆ DEMONSTRANT, maxim modified, 475.
PATERNITY, (*primâ facie*) evidence of, scrutiny of features, by way of, 451 *h*.
presumed, from access, 479 *d*; see *Access, Bastard, Filiation.*
PATRON, of a living, name of, blank as to, in Bishop's registry, 276 *e*.
parol evidence to prove who was, admissible, 276 *e*.
PATRONAGE, right of,
evidence of reputation as to, 306 *f*.
PATTERNS, piracy of, 455.
PAUPER; see *Formâ Pauperis; In Formâ Pauperis.*

PAYMENT, Actual, when must be proved, 6 *a*.
of Bond, presumption as to, after twenty years, refuted by evidence of impossibility, 474 *f*.
of Consideration Money, memorandum as to, *on* a deed, affected by parol evidence, but *in* a deed, *secus*, 276 *e*.
of Debt, receipt for, only *primâ facie* evidence of, 276 *b*.
may be proved by parol, *ib*.
of Legacy, presumption as to, 478 *e*.
of Portions, presumptions as to, value of, 474 *f*.
of Rent, *primâ facie* admission of the title of the landlord, 463.
of Tithes, effect of, 463 *e*; see *Parson*.
r offer of, to a witness, effect of, to restore competency, 375.
proof of; see *Accounts, Cheques, Declarations, Entries, I O U, Statements, Written*.
INTO COURT, when a term imposed, in granting a commission to examine abroad, 115 *d* and *e*.
TO COMMISSIONERS, how formerly computed, 106-7.
under Orders of May, 1845, 111-12 *a*.
TO WITNESSES; see *Conduct Money, Remuneration*.
PEDIGREE,
cases of, where proof of a negative must be furnished, 389.
family, use of, in evidence, proof of custody, writing, &c., 267 *b*.
hearsay as to, admissible, 316; see *Declarations, Hearsay*.
an issue directed in case of, motion for a new trial of, 529 *a*.; see *Issue*.
proof of, 186 *f*.
traditions as to, and evidence in support of such, weight due to, 472 *a*.
what matters of may be proved by evidence of declarations, 320.
written, use of, in evidence, 318 *c*.
compiled by one of the family, and endorsed, as true, by another, *ib*.
written, hung up in the family mansion, good evidence, and why, 319 *c*.
written, manufactured in consequence of legal proceedings, 324 *a*.
See *Declarations, Depositions, Hearsay, Husband, Illegitimate, Issue, Letter, Wife, Will, Written*.
PEER,
answer of, as to costs, 11 *d*.
a witness, being, must, nevertheless, be sworn, 65 *f*.
even when a Sovereign of another country, answers a cross-bill on his oath, 65 *f*.
making an affidavit, is required to swear to it, 541 *a*; see *Oath*.
presumption of a writ of summons of, 484 *d*.
temporal, widow and dowager of, privilege as to answering on honour, 65-6 *f*.
PEERAGE,
patent of, recital of, in Journals of House of Lords, 150 *a*.
privilege of, as to answering on honour, 65 *f*.
right to, 135 *a*; see *Dignity, Claim to; Honour*.
in claim of, cases stated by, for the opinion of counsel, rejected, 319 *c*.
pedigree made by the claimant's father, with a view to a suit respecting property not receivable, 319 *c*.
evidence required by the House of Lords, (Irish case), 421 *b*.
Journals of Parliament, recitals in, 150 *a*.
Records of Parliament, use of, 150 *a*.
see *Parish Registers; Registers*.
PENAL LAWS, not construed *by* Equity, although construed *in* Equity, 1 *b*.
PENALTIES, inflicted by Acts, 408.
PENALTY, on a bond, how far witness liable to, yet must answer, 84 *c*.
to be recovered by a witness, waiver of, &c. 82.
PENDING, a cause, proof of, to let in use of depositions in another, 259; see *Action pending, Cause pending*.
PENSION, grant of, parol evidence to shew a trust, not admissible, 293 *c*.
PERFORMANCE, of agreements, suits for, evidence in, 243-4; see *Agreement, Specific Performance*.
PERJURY,
on trial for, how far one witness insufficient, 5 *b*.
the danger of, the reason for avoiding re-examinations, 209 *b*.
precautions to prevent, 433-4.
consequences of, incurred by every person taking an oath, "in such form and with such ceremonies as such person shall declare to be binding," 45 6-7 *f*.
assignment of, in an affidavit, 540.
in case there should be an indictment for, entry on depositions, 109 *c*.
in an indictment for, strictness in, 150 *f*.
office copy of depositions not proof, 259 *a*.
plaintiff not to impeach defendant of, after offer to be concluded by his answer, *Order for*, 506 *b*.
in a prosecution of a defendant for, evidence of a plaintiff, 349 *e*.
of a witness, conviction for, after hearing, may be used at rehearing, 537 *e*.
conviction for, no bar to the affidavit of the party to sue *in formâ pauperis*, 545 *e*.
in a suit to perpetuate testimony, 135.
by witnesses to a will, remarkable instance of, 386 *a*.
a witness not indictable for, where the fact falsely sworn to, is not material, 207.
suspicion of, ground for a new trial, 528 *b*, and see *New Trial, grounds for*.

PERJURY—*continued.*
in Scotland or Ireland; see *Credibility, Oath, Testimony, Witnesses.*
PERPETUAL MEMORYE, examination of witnesses in, Ancient Order as to, 129 *a.*
PERPETUATE TESTIMONY,
depositions to, publication of, 51.
suit to, further examination of witnesses in, 197 *d.*
PERPETUATING TESTIMONY, in certain cases, Act for, 134-5.
in suit for, application for a commission to examine witnesses abroad, 117.
PERPETUATION OF TESTIMONY,
suit for, 129; see *De bene esse*, and *In perpetuam rei memoriam.*
PERSON *in loco parentis*, legacy from, ademption of, 298.
having assumed so to be, 298-9.
PERSONAL ESTATE, in a foreign country, will of, may be proved there, 182 *b.*
PERSONS, certain classes of, precluded from testifying, 377, *et seq.*
not parties, interest of, inquiry as to, 491-2.
DECEASED; see *Declarations and Entries by.*
PER TESTES, suit to prove a will, publication in, 144.
PERTINENCY; see *Impertinency, Scandal.*
PETITIONS,
Bills or, in Chancery, earliest filed, 151.
affidavits used in support of, 511 *e*, 538 *b.*
in Bankruptcy, parties to, as to examination of, on trial of an issue, 525 *f.*
rehearing of, on new evidence, 537 *c.*
for leave to enter into evidence to supply defects or omissions of evidence, 199 *b.*
copy of, 156 *b*; see *Insolvent Acts.*
prolixity in, 229 *c.*
See *Affidavits.*
PHYSICIAN, communications to, not privileged, 381 *b*; see *Medical Attendant, Professional Witness.*
PHYSICIANS, COLLEGE OF, Statute touching, 148 *d.*
PIRACY OF COPYRIGHTS, injunction against, 454-5.
OF PATTERNS, used in printing cottons, &c., *primâ facie* judgment as to, on inspection, 455 *b.*
PLACE OF CUSTODY, of a document, circumstances to prove its genuineness, &c., 186 *f*; see *Custody.*
PLAINTIFF,
right of, to discovery, how limited, 19 *c*; see *Discovery.*
affidavits by, 538-9.
affidavit by, to be annexed to certain Bills; see *Affidavit, Bill.*
oath of, 367 *b*, *et vide infra.*
right of, to examine witnesses *de bene esse*, 121 *c.*
making suggestions in his bill, proved to be untrue, (in effect) to pay costs, 151.
pauper to be whipped! 151 *a.*
for whom depositions, in former suit, available, 259, *et seq.*
PLAINTIFF—*continued.*
cannot examine co-plaintiff, 339.
course of, when examination of co-plaintiff requisite, 339.
examination of, on a reference or the trial of an issue, 341.
examination and cross-examination of, by consent, 367 *c.*
examination of; see *Examination, Party.*
in a suit for specific performance, has not the same right as a defendant has to the use of parol evidence, 291.
swearing to truth, 116, *et vide supra*, Affidavit of, Oath of.
See *Bill, Party.*
PLAN, used as an exhibit, 146 *a.*
PLANTATIONS, 125; see *Colonies, &c.*
PLEA,
effect of, 10; as to admissions, 22.
being found false, 10 *e*; plaintiff entitled to a decree, and if discovery necessary, to examine defendant on interrogatories, 211 *c.*
of a statute; as of Frauds, Limitations, &c., 406; see *Statutes.*
use of a decree as, 422
see *Answer in form of a Plea.*
PLEAD TO ISSUE; see *Order for an Issue.*
PLEADERS, restricted in their testimony, 377; see *Counsel, Privilege.*
PLEADING,
rules of, 6 *e*; see *Answer, Bill, Demurrer, Plea, Replication.*
an Act of Parliament, 405.
at law, an Act of Parliament, 406.
instances of, an estoppel, by admission in, 461 *b.*
admissions or statements in; see *Bill, Answer, Plea, Demurrer.*
analogy to, of the examination of a party, as a party, 518.
matters not in, evidence as to, 229-30.
matters not in, and matters in but admitted by, or immaterial, evidence as to, impertinent, 229.
facts not put in issue by, inquiry as to, 491-2 *a.*
petitions, or affidavits, not having been referred for impertinence, prolixity in, Order as to, 229 *c.*
before 1636, were not enrolled, 259 *d*; see *Records.*
See *Answer, Bill, &c., Conversations, Facts not in the Pleadings.*
PLENARY ADMISSIONS, 23; see *Admissions.*
PLUMER, Mr. (Examiner) his evidence, 72, *et seq.*; his suggestions, 75.
POINT raised by the Court, at the hearing, and not proved in the cause, witnesses examined as to, 203 *e.*
POISONING; see *Homicide.*
POLITICS; see *Government, acts of.*
POLICE, informers or agents employed by, 377.

POLICE—*continued.*
record, extract from, rejected by the Court of Admiralty, 433 *d.*
POLICY, Public, precluding the disclosure of certain matters, 377; see *Public.*
deposit of, *onus* of proving notice, 389 *a.*
POLYGAMY; see *Bigamy.*
POOR LAW ACT; see *Bastard.*
POOR RATES; see *Assessments, books of.*
PORTION TO A CHILD, by a testator, how far an ademption of legacy, 297 *a.*
parol evidence to show the author of, on question of ademption of legacy, 298 *a.*
advanced by a testator to a child, presumption raised and rebutted, 477-8.
PORTION OF A DOCUMENT, use of, effect of, 466 *c.*
POSSESSION,
raising presumption as to ownership, 474 *d.*
undisturbed for twenty years,
on the part of a mortgagee, 476 *b.*
party in, declaration by, in an answer, 468 *c.*
quieting, from a principle of, presumptions, 484.
adverse, evidence of, 485 *e.*
title depending on, 485 *e.*
of property, by a testator, extrinsic evidence of, to explain his will, 283 *e.*
going along with a deed, effect of, 185 *d.*
will, 185-6 *a.*
of a document, by a party, effect of, proof of, 273; see *Detainer, Document, Party, Production.*
of documents by parties, or others, 274 *a.*
"Custody or Power," construction of the words, 274 *c.*
See *Lease and Release.*
POST, transmission by, of depositions of witness examined abroad, mistake, 120 *d.*
POSTEA, 161-2; see *Record, Nisi Prius,* copy of, use of, by itself, 162 *b* and *c.*
POST LITEM MOTAM, declarations or statements made, 321.
lis, definition of, 322 *a.*
POSTMARK, on a letter, 187 *c.*
POST MORTEM, inquisitions, use of, in pedigree cases, 316 *i.*
POWER OF ATTORNEY to surrender a copyhold, secondary evidence of, 271 *c.*
see *Jamaica.*
POWER OF MASTER, to examine, *viva voce*, 507-8, *a*; see *Examination, Master.*
POWERS, execution of, proof of, 174 *a.*
intention to execute, parol evidence of, not admissible, 287 *a.*
wills made, since 1837, in execution of, not revoked by marriage, &c., with certain exceptions, 300 *e.*; see *Appointment, Feme Covert.*
PRACTICE, Affidavit as to, impertinent, 543 *h.*
Certificates as to, 401.
Statements of the Officers of the Court as to, 401.
PRAYER BOOK, test of the age, genuineness, &c., of 319 *e* and 398-9 *a*; see *Bibles, &c., entries in.*
PRECEDENTS, decisions of similar cases, use of, 401 *e.*
Reported Cases, 402; see *Reports.*
PRECISE WORDS, witness in the Admiralty Court, in cases of collision, not bound down to, 472 *a.*
PREJUDICE; see *Correspondence, Letters Without prejudice.*
PREGNANT; see *Negative Pregnant.*
PRELIMINARY Accounts or Inquiries, ordered on statements in the answers, 12 *a.*
Order as to, 489-90.
(under the late Order) when directed to be taken and made, 490 *a.*
Inquiries not unfrequently lead to others, 492 *a.*
PREPOSITUS, or REEVE, *compotus* of, 165 *g.*
PREROGATIVE COURT,
exemplifications from, forms of, 414.
having admitted papers to probate, as a will and codicil, is conclusive evidence of their being distinct, 444 *a.*
Judge of, has no authority to examine witness *viva voce*, upon the final hearing of a testamentary cause, 493 *e.*
See *Administration, Letters of Administration, Probate, Will.*
PRESENTATION,
proof of, when unnecessary, 463 *e.*
PRESENTMENT, as to repairing a bridge, record of, 165 *g.*
by Jurors of a Court of Survey, 166 *a.*
entries of, in Books of a Manor, no evidence of ownership, 311 *b.*
PRESERVATION OF TESTIMONY, 129 *a*; see *De bene esse, In perpetuam rei Memoriam, Perpetuating Testimony.*
PRESCRIPTION, presumption from, when the enjoyment has been from time immemorial, 476 *c.*
PRESCRIPTIVE RIGHTS,
evidence of, reputation as to, 307.
PRÆSUMPTIO—violenta—probabilis—levis—seu temeraria, 473 *a.*
derivation of the word, 473 *b.*
juris et de jure, 475-6, 475 *a.*
juris, but not also *de jure*, 477.
PRESUMPTION,
when two legacies are given to one legatee, 294 *b.*
by Civil Law, that legacies by Will and Codicil are accumulative, 296.
prior to 1838, of revocation of a will, by subsequent marriage and birth of a child, 300, *et seq.*
of revocation of a will, prior to 1838, 301.
of revocation of will, rule as to, extended to be considered as a rule of Law, 302; see *Revocation, Will.*
that lost instrument was duly stamped, 272 *c.*
as to possession of books of an old corporation, 167 *e.*

PRESUMPTION—*continued.*
arising from the use of secondary evidence, 247.
as to death, 260 *c*; see *Death.*
that by "daughter" was meant a *natural* daughter, evidence to rebut, 284 *b.*
as to survivorship, or non survivorship, 487 *e*; see *Death.*
is, that a person duly executes his office; the contrary is to be proved, 389 *c.*
by the law, of the affirmative, until the contrary proved, shifts the *onus probandi*, 389.
PRESUMPTIONS defined, and kinds of distinguished, 473, *et seq.*
may be rebutted, and then *contra* supported, by any kind of evidence, 294 *b.*
but may not be so raised, *ib.*
except those *juris et de jure*, may be rebutted with any kind of legal evidence, 488.
which a Jury will be directed to make, 476.
a Jury bound to make, the Judge in Equity will make, 486.
of Facts, bold inferences made for the furtherance of Justice, 484.
remarks of Sir D. Evans on cases of, 485.
of Law, anterior to evidence, 474.
sent to be tried by a Court of Law, but not by a jury, 474 *a.*
not sent to a jury, 478 *a.*
allied with estoppels, 475 *a.*
generally, 476 *b.*
from the usual habits and feelings of mankind, 477.
Mr. Starkie's observations as to, 486 *a.*
weight and effect of, observations by Sir W. D. Evans, as to, 488 *c.*
See *Presumptio; Presumption.*
PRESUMPTIVE EVIDENCE, 473 *b.*
PREVARICATION, OF WITNESSES, or answering evasively, punishment for, 76.
in Chancery, very little inconvenience from, 75.
See *Perjury.*
PRIESTS must divulge confessions, 381 *c.*
PRIMA FACIE EVIDENCE,
what is, in certain cases, 390 *a.*
distinguished from conclusive evidence, 246 *a*, 390 *a.*
effect of, to shift the *onus probandi*, 246 *a*, 390 *a.*
distinguished from secondary evidence, 176 *c.*
admissions, which operate as, 463 *a.*
of items of an account, taken after lapse of many years, 196 *a.*
PRINCES, (mere) assertions of, not proof, 254 *g*; see *Oath, Peer.*
PRINCIPAL; see *Agent, Surety.*
PRINT, copyright of, piracy of, 44 *b.*
PRINTED COPIES
of Acts of Parliament, 404 *m.*
of certain Parliamentary and Royal documents, purporting to be printed by the proper printers, 148-9.
PRINTED COPIES—*continued.*
certain, of certain documents, *quasi* examined copies, 149.
PRINTER; see *King's or Queen's*, 148-9.
King's, Queen's, copies of documents printed by, 148 *c*, or purporting so to be, 148-9.
to either House of Parliament, documents purporting to be printed by, 148-9,
PRISON; see *Witness in Prison.*
PRIVATE, an examination of a witness, must be, 220 *d.*
AFFAIRS, though of general interest, not proveable by history, 398.
MATTERS, in general, not proveable by the Gazette, 400.
PRESCRIPTIVE RIGHTS, evidence of reputation as to, 307.
ROOM (of the Judge) examination of witness in, *viv âvoce*, as to a ward of Court, 494 *b*; see *Feme Covert.*
STATUTES, must be mentioned in the pleadings, and then proved, 405 *e* and *f.*
See *Confidential Communication, Examination, Priest, Privilege, and Profession.*
PRIVILEGE of Lords of Parliament, &c., as to answering on honour, 65-6 *b.*
as to production of documents, by witnesses examined under commissions executed in Scotland or Ireland, 127.*
from being examined as a witness, 78 and 377.
see *Demurrer to Interrogatories.*
of professional advisers not to testify, is the privilege of their clients only, 378 *e.*
See *Attorney, Counsel, &c., Officers, Police, Privileged Communications, Production.*
PRIVILEGED COMMUNICATIONS, &c., 78.
professional, 80 *h.*
as to certain communications, whether confined to the cause, *qu.*, 382-3 *a*
see *Documents, Privilege, Production.*
PRIVITY; see *Confidence, Trust.*
PRIVY COUNCIL, proceedings in, not to be disclosed, 86 *c*; see *Judicial Committee of.*
PRO CONFESSO, use of allegations, in a bill taken, 18 *b.*
bill taken, effect of, as plenary admission, 22 *b.*
issue taken, motion to have, order made on, 625 *c*; see *Cross-bill, Issue.*
PRO INTERESSE SUO,
examinations of persons, instances of, 519 *c.*
examination of one, mode of proceeding on, 519.
for examination of one, interrogatories to be settled by the Master, 519.
one examined, allowed to sue *in formâ pauperis*, 519 *c.*
an examination of one, course as to, in Ireland, 519 *c.*

PRO INTERESSE SUO—continued.
interrogatories to falsify, motion for leave to exhibit, of course, 520.
to compel a party to be examined, the Court has no jurisdiction, 519 *c.*
PROBATE OF A WILL,
in the Ecclesiastical Court, admitted, or else not proveable by other evidence, 12 *a.*
copy of the record of Ecclesiastical Court, 194 *a.*
no proof of its effect, 178 *c.*
taking, the waiver of further right, 179 *a.*
allegation of, in a bill by an executor, 442 *c.*
how far sufficient, 182 *b.*
no proof of the death of the testator, 250 *a*, 442 *c.*
not even secondary evidence of a will of lands, 272 *b.*
inadmissible on a question of pedigree, 319 *f.*
forgery of, 443.
or a forgery of, *ib.*
may be proved to be forged, 444 *d.*
but not to be of a forged will, *ib.*
may be invalidated, by showing the Court had no jurisdiction, 444 *e.*
although genuine and valid, not conclusive evidence, to all intents and purposes, 444 *a.*
is evidence of the sanity of the testator, and his competency to dispose of his personal estate, but not as to realty, *ib.*
not evidence as to lands, even if original lost, *ib.*
Act book of the Ecclesiastical Court, 414.
need not be accounted for, if Probate book produced, 414 *b.*
see *Copy; Will.*
PROCÈS VERBAL,
production of, required, 164 *b.*
PROCEEDINGS
under a Decree for a Reference, Orders as to, 502, *et seq.*; see *Master, Reference.*
directed by the Court, as the exigency of the cause may require, 492 *a.*
on the trial of an issue directed, entirely under the authority of the Court of Equity, 524.
in Chancery, since the 17th of Richard II., found in the Tower, 151.
in Ecclesiastical Courts, use of, as evidence, 439, *et seq.*
in Equity, use of, at law, 422.
of inferior Court, inspection of, 169-70.
in suits in Equity, exemplifications of, 411 *c.*
in same suit, proved by office copies of, *ib.*
in other suits, use of, 421, *et seq.*
prior, when proof of, necessary to let in subsequent, 161.
when parts of admitted, 163.
at Law, use of in Equity, as evidence, 430, *et seq.*
affidavit to verify, not evidence, 447 *c.*
impertinent, 543 *h.*
PROCHEIN AMI (before the Act) he and his wife he being liable for costs, incompetent, 357 *c.*
but now (since the Act) admissible, 357 *c.*
PROCLAMATIONS, Royal, copies of, purporting to be printed by the printer to her Majesty, 148-9.
judicial, notice of, 408 *b.*
PROCTORS restricted in their testimony, 378.
and clerks, privilege of, 380 *g.*
PRODUCTION
of the best evidence, being documentary, hindered, proof of, to let in secondary, 268.
of the books of a Corporation, 170-1.
at the instance of strangers, 171 *c.*
see *Books; Corporation, books of; Documents.*
of an exhibit, adverse party has no right to, without a special order, except, &c., 192.
in Court, or at Assizes, 192 *g.*
of Records, 151, 169 *f.*
of an original will, by officer of the Court, 178 *d.*
of documents, allegations in a bill (in order to obtain) 27.
rights to, generally, 30, *et seq.*
which support the case of the plaintiff, 31.
resistance to motion for, general ground of, 37.
form of admission, 37-8.
qualified admissions, 37.
nature of the document, 39, *et seq.*
cases and opinions, 39.
title deeds, 39.
of documents not strictly privileged, 43.
right to, not reciprocal, 44.
deposit with the Master, 45.
which support the case of the defendant, 32.
see *Discovery Motion, Privilege.*
only, except by consent, before the officer of the Court, 501 *a.*
on reference, order as to, 510 *b.*
see *Four-day Order.*
of a book (at law) although detrimental to witness, 84 *b.*
of documents, by a witness, refusal or neglect of, 108 *d* and *e.*
at trial at law, &c., of documents admitted by a defendant to a bill for discovery in aid of action at law, 227 *f.*
of documents, absence of, letting in secondary evidence, 46 *d*, 273 *c.*
notice of, 273 *b.*
withholding of, by a party, 273-4.
see *Party; Subpœna; Withholding.*
PROFESSION, certificate of Ordinary to prove, 253 *f*; see *Monasteries, Monastic.*
PROFESSIONAL privilege, as to testifying, 80 *h.*
advisers restricted in their testimony, 378.
privilege from testifying may be waived by the client, 379.

PROFESSIONAL—*continued.*
advisers, not every communication with, privileged, 383-4; see *Privilege.*
men (witnesses), even the mere opinions of, respect due to, 233 *b*; see *Scientific.*
PROLIXITY, Order as to, inapplicable to evidence, except by affidavit, 218 *e.*
and superfluity, 245.
in affidavits, 543 *h*, 545 *a.*
in interrogatories, how necessary, 55.
as distinct from impertinence, 59 *a.*
Order as to, 229 *c.*
short of impertinence in interrogatories, or depositions, *semble* not provided for, *ib.*
see *Impertinence; Relevancy.*
PROMISES, TO TESTATORS
preventing or inducing a testamentary disposition, parol evidence to show and enforce, 292-3.
preventing disentailment, &c., parol evidence to show and enforce, 293 *b.*
see *Executor, Fraud, Heir, Issue, Trust, Will.*
PROMPTING a witness not allowed, 220 *h*; see *Statements, Memory.*
PROOF
in Courts of Equity, as in Courts of Law, sufficient evidence is, 3.
what that is, in Courts of Equity, 239 *a.*
full, in general, to be made before publication passes, Order requiring, 501 *d.*
of various matters, (accounts, &c.,) to be deferred until after the hearing, 503 *d.*
of the case of the plaintiff, need not be stated in his bill, 19; see *Put in Issue.*
of matters, statutory declarations for, 460-1.
of will; see *Probate, Will.*
as distinguished (by Sir D. Evans), from presumption, 488 *c.*
read, but not entered, consequences how rectified, 533-4.
entered as read, but not read, mistake how rectified, 534-5.
as synonymous with evidence; see *Bill, Evidence, Review, Reviver, Supplement.*
PROPERTY, estate, or interest in,
bill to perpetuate testimony as to, 134-5.
presumption as to, 479 *b.*
of a testator, acquisition and possession of, situation and general state, extrinsic evidence as to, to explain a will, 283 *c.*
PROSPECTIVE DIRECTIONS, as to evidence, in an Order of Reference, 504 *b.*
PROTECTION from being examined, 78; see *Demurrer to Interrogatories, Privilege, Professional.*
OF WITNESSES, going to and returning from, the Master's Office, 507 *a*; see *Arrest.*
PROTEST; see *Notary Public.*
PROVINCIAL; see *Dialects, Languages.*
PROVING a will for certain purposes, 179, 181; see *Probate, Will.*
PUBLIC;
see *Customs, Reputation, Right.*
company; see *Company, Corporation.*
PUBLIC—*continued.*
Documents, right to inspect, 170 *e.*
quasi such, *ib.*; see *Assessments, books of.*
copies of, available in evidence, 169.
inspection and copying same, *ib.*
use of histories, as to, 397.
events, facts; see *Chronicles, History.*
matters, some proveable by the gazette, 400.
officer, demurrer to interrogatories by, privileged and precluded from disclosing, 377.
policy precludes certain testimony, 46 *e*, 86.
suit dismissed on ground of, 111 *d.*
see *Government, Police.*
right, any person, though interested (as all persons are), competent to prove, 368.
sale; see *Auctioneer.*
Statutes recognised, but Private to be proved, 405 *e*; see *Acts of Parliament.*
Notary; see *British Consul; Stock.*
PUBLICATION, of depositions,
(old practice) as to, 136.
when to pass (new practice), 136-7.
when passes, 71, *et vide infra.*
when passed, examiner gives out the original depositions to, &c., 71-2.
see *Commission, Depositions, Examiner.*
secrecy enjoined on commissioner and clerk until it shall pass, 99.
of depositions taken *de bene esse*, 142 *g.*
common order, 143 *b.*
of witnesses afterwards examined refused, 143-4.
passed, examination of witnesses after, 141 *a.*
examination after, by special order, 194, *et seq.*
in the Ecclesiastical Courts, *ib. a.*
in the Chancery of Ireland, *ib. b.*
in special cases to supply defects or omissions of proof, 196 *b.*
instances of, old cases, 203 *e.*
passed, and depositions known, in general, neither side to examine, 203 *e.*
see *Examination, Further Examination, Re-examination.*
motion to suppress for irregularity before, 219 *b.*
or within a reasonable time after discovery of the irregularity, 219 *b.*
of depositions on a reference, 501 *d.*
(in general) no witness to be examined after the day of, though sworn before, 501 *d.*
of evidence, on a state of facts, 504 *e.*
how passed, 509-10 *a.*
examination after, 512 *c.*
in a cross suit, 12 *b.*
passed in original cause; see *Cross Cause, Depositions in.*
OF A WILL, (made after 1837), not necessary, 183.

PURCHASE for a valuable consideration, without notice, 389 *a*.
plea of, 85.
legal estate to support, *ib. a*.
see *Inability of an Administrator*.
PURCHASER, without notice, how far protected from answering, 85, 389 *a*.
of a reversion, must prove he gave a full price, 390 *a*.
primâ facie, presumed to have had inspection of deeds recited in his conveyance, 479.
PUT IN, evidence not, 212 *b*.
"PUT IN AND READ," evidence which has been, available before the Master, 505 *e*; see *Enter, Registrar*.
PUT-IN-ISSUE, documentary evidence not being, yet available, unless of admissions of conclusions of law, 230 *a*; see *Conversations, Issue*.
PUTTING-IN-ISSUE; see *Issue, Replication*.

QUAKER,
solemn affirmation by a witness being such, 65-6 *f*.
affirmations by, in lieu of oaths, statutes relative to, 332 *c*.
examination of, by a Commissioner, on solemn affirmation and declaration, 98.
appointed a Commissioner, at law, his affirmation sufficient, 98 *b*.
devices of, to avoid swearing to an answer in Chancery, 65-6 *f*; Order as to, 540 *h*.
QUARRIES, terms relative to; see *Technical Terms*.
QUEEN, printer to, copies printed by, 148 *c*.
purporting to be printed by, 148-9.
act to perpetuate testimony in certain cases as to honour, &c., 135.
QUEEN'S; see *King's Remembrancer, &c.*
QUESTIONS, leading, in substance, 57.
in form, 58; see *Interrogatories*.
QUIETING POSSESSION, from a principle of, presumptions, 414.

RABBI, certificate of circumcision by, 167 *f*.
RAILWAY ACTS, 408.
COMPANY, book of shares of, under seal of, 157 *b*.
RATIONI TENURÆ, liability to repair a sea wall, evidence of extent of, 236 *e*.
READ, or put in, evidence not, 212 *b*; see *Decree, form of; Evidence; Proof; Put in; Registrar, duty of*.
READING OF EVIDENCE at the hearing, 212.
reserving decision as to its validity, 376 *d*.
REALTY, will of, executor a competent witness to prove, 361 *c*.
see *Probate; Will, exemplification of*.
effect of, 187 *c*; see *Stamp*.

RECEIPT,
primâ facie evidence, 176 *c*.
of what, 390 *a*.
of a Master, for a deed, no evidence of its contents, 271 *c*.
should come out of proper custody, 311 *f*.
for rent, (out of proper custody), used as evidence of seisin, 311 *f*.
for the last rent given, former presumed to be paid, 475 *a*.
by a clergyman, proof of handwriting, 267 *b*.
for tithes, by a Parson, may be evidence for his successor, 311 *f*.
of tithes, operating as an admission of being the Parson, 463 *f*.
in full of all demands, effect of, 475 *a*.
under hand and seal, effect of, 475 *a*.
stated, by mistake, in an examination, to have been joint, mistake corrected, 518 *c*.
proof of; see *Accounts, Declarations, Entries, Statements, Written Statements*.
RECEIVER, deceased, entries in books, &c., by, 310 *b*.
books of, 453.
examination of person, *pro interesse suo*, against, 519 *c*.
of a city, accounts of, entries in, 310 *b*.
RECITALS,
in decrees, Ld. Brougham, C., order of, as to, 162 *f*.
the evidence afforded by, 271 *c*.
in a bond, use of, as secondary evidence, 271 *c*.
of deeds in other deeds, used as secondary evidence, 271 *a*.
of one deed in another, 462 *b*.
of deeds in conveyances, effect and utility of, 478-9 *a*.
in a deed between plaintiff and defendant, evidence of, admissible to explain, 271 *c*.
the non user of, as evidence of pedigree, 319 *f*.
effect of, as admissions, by way of estoppel of the parties, 462.
of a Patent of Peerage, in the Journals of House of Lords, 150 *a*.
in letters patent, 416.
in preamble of a Statute, why held to be true, 399 *a*; see *Statute, private*.
in record-book of a manor, 167 *b*.
in settlements, of a deed of appointment, use of, as secondary evidence, 271 *c*.
RECOGNITION of other governments, by ours, 399 *e*.
of a deed, in other deeds, used as secondary evidence, 271 *a*; see *Recital*.
RECONCILIATION of Husband and Wife; see *Non Reconciliation*.
RECORD, matter of,
may be proved by the record,
on hearing on bill and answer, 22 *c*.

RECORD—*continued.*
nisi prius, with *postea*, endorsed, 16 *e.*
when evidence, when not, 161-2.
what strictly such, 154 *a*, 164.
certified copies of, Act for facilitating admission of, 157-8.
in the cause, office copies equivalent to, 158.
copy of, what should contain, 160.
not being in existence, sworn copy not admissible, 164-5.
lost, when copy admissible, *dictum* of C. B. Gilbert, 166 *b.*
relating to the revenue, 165-6.
book of manor, recital in, 271 *e.*
deed enrolled, under an Act of Parliament, looked upon as, 417 *e.*
credit formerly given to, 420.
force of, however proved, *ib.*
attendance of clerk in Court with, at the hearing, 151 *d.*
depositions, refusal to, 111 *e*; and see *Exemplifications.*
of the Court of Chancery, at trial at law, when the original used, 158 *b.*
of the Court of Chancery in Ireland, not produced, when office copy would suffice, 150 *b.*
AND ENROLMENTS, bill, land revenue, Office of documents in, 166 *a*; see *Judge, certificate of.*
AND WRIT CLERK, to attend with Records, &c., 151 *d.*
see *Officer of the Court.*
exhibits being, proof of, 147, *et seq.*
report of the committee on the Cottonian library, and records in 1732 cited, 147 *e.*
public, Act for keeping safely, 147 *d.*
parliamentary, 148; see *Parliament.*
of parliament, use of, to show sitting in, 150 *c.*
whether the memorials of the proceedings in Court of Chancery be such, 150.
production of, 151.
exemplification of, 153 *e.*
of other Courts, 153, *et seq.*
obtained by writ of *certiorari*, 411-12.
sent out by *mittimus* to other Courts, 412 *b.*
all, may be proved by sworn copies, but as to what are such, 164, *et vide supra.*
safe custody of, access to, 169.
inspection, copying, production, *ib.*
judicial cognizance of, 408 *c.*
account of, a Bill (proposed) as to, 409 *b.*
Public, Act for keeping safely, 410.
exemplifications of, 410-11.
COMMISSION, reports of, 166.
COMMISSIONERS, Chancery Records found by, 151; see *Proceedings in Chancery.*
COURTS OF, 153 *d.*
RECORDS, Ld. Coke's definition of, 147 *e.*
C. B. Gilbert's description of, 147 *e.*
Mr. Butler's division of, 147 *f*, 148.
RECORDS—*continued.*
in custody of the Master of the Rolls, copy certified, sealed, or stamped, 470.
chasm in, ground for, a presumption, 481.
see *Stamp.*
RECORDER of London,
certificates as to customs, 253 *d.*
RECOVERIES; see *Statutes.*
RECOVERY suffered, *omnia presumuntur, rite*, &c., 480 *c*; see *Fines.*
RECTOR, since deceased, entries in books by, available to the successors of, 311 *f*; see *Curate, Parson, Vicar.*
RECTORY, lessee of, entries in books by, as to tithes, 312 *c.*
REDEEM, in a suit to, *primâ facie* title is sufficient, 490 *a.*
issue not directed, although title complicated, if uncontradicted, 490 *a.*
REEVE, *prepositus* or, *compotus* of, 165 *g.*
RE-EXAMINATION
OF A DEFENDANT already examined as to accounts, 196 *b.*
OF A PARTY before the Master, whether, when, and how often, in the judgment of the Masters, 517-18.
OF A WITNESS,
when an order requisite for, 69-70.
after publication, sometimes allowed under special circumstances, 75.
when (by reason of, &c.), examination was nugatory, 69 *b.*
depositions suppressed, 105 *d*; *et vide infra.*
motion for, in case of a mistake, 198 *b*; or on the ground of accident or surprise, 199-200.
except as to exhibits, or who has been examined only as to exhibits, only in cases of accident or surprise, 200.
course as to, in the Exchequer, 200 *e.*
in the Chancery of Ireland, *ib.*
before the Master, although only further examination, not without an order, 200-201.
as to the same matters, rule against general, 203 *b.*
but not universal, *ib. c.*
after suppression of depositions for irregularity, seldom refused; the cause stands over in the meantime, 219 *e.*
without order, irregular, 221 *d* and *e.*
when the depositions have been suppressed, for irregularity, the cross-examination also to be repeated, 225 *a.*
as to the point of interest, 329-30.
Order for, Motion for, 207, *et notis.*
before the Master, not without a New Order, 518; see *Interrogatories for.*
REFERENCE,
TO A MASTER, 489, 501, *et seq.*
on an interlocutory application, to ascertain a fact, 490 *a.*
order on for the examination of the parties, 341.

REFERENCE—*continued.*
to "two persons of learning and abilities, &c.," in case of an allegation of piracy of copyright, 454-5.
for scandal and other impertinence, 216.
for irregularity, 224 *c.*
of an affidavit for scandal, 544 *d.*
of an affidavit, pending, it cannot be used, 545 *a.*
of two affidavits, by one order as to, 545 *c.*
to settle an Issue, in case the parties differ about the same, 524 *a.*
to settle a Case, to be sent to a Court of Law, 531 *b.*
to review his Report, further evidence on, 521 *d*; see *Accounts, Creditor, Claimant, Exceptions, Heir, Inquiry, Master, Report.*
SPECIAL, instance of, in case of an allegation of piracy of copyright, 455 *a.*
REFRESH; see *Memory.*
REFUSAL by witnesses to produce documents, 275 *c*; see *Subpœna duces tecum.*
of evidence; exceptions to Master's report for, 521.
REGISTER;
see *Parish Registers, and (so called) Non-Parochial Registers.*
of burials, extracts from, to prove death, under 6 & 7 Wm. 4, c. 86, 250 *a.*
of marriage, entry in, 159 *f.*
examination of originals in a case of peerage, by the Attorney General, using a magnifying glass, 267 *c.*
genuineness of,
ascertained by a careful inspection, 453.
use of, to prove the handwriting of the clergyman, 267 *b.*
in Bishop's registry, use of copies of, 268 *c.*
(so called) of baptisms, &c., kept at meeting houses, &c., 167 *f*; see *Baptism, Burial, Bishops, Circumcision, Death, Marriage.*
REGISTERING, OF CONVEYANCES, in the Register Counties, 419.
OF SHIPS, 419.
AND FILING of Affidavits, Order as to, 543-4 *a.*
REGISTRAR,
certificate of, as to practice, 401.
duty of, to assist the Court in the inspection of documents, &c., 453.
to enter the evidence used, 212 *b*, 533; see *Chancery Commissioners Report.*
book of, value and use of, 423; see *Minute Book of.*
or Librarian, examination of, to prove an exhibit, 189 *a.*
REGISTRATION of births, deaths and marriages, Act as to, 316 *h.*
REGISTRY; see *Bishops, Bibles, &c.; and see Non-Parochial Registers, Parochial Registers, Registers.*
REHEARING,
reading at, of exhibits not proved at the hearing, 199 *a.*
REHEARING—*continued.*
on a, upon special application, new evidence may be received, 199 *e.*
discovery of new evidence ground for, in the Exchequer, 199 *f.*
evidence on, 533, *et seq.*
to rectify mistakes in not entering proofs, as read, 534.
the latitude given by, for the introduction of new evidence, 536 *d.*
on a, new evidence allowed, but not a new case, 536 *e.*
REJECTED EVIDENCE, notice of tender of, 536 *a.*
RELATIONS,
hearsay of, as to pedigree, 317 *d*, 318 *a.*
how the consanguinity exists, 317 *f.*
testimony of, as to pedigree, 320 *d*; see *Declarations, Declarations of, Hearsay, Pedigree, Statements, Will.*
RELATIONSHIP, evidence of reputation as to, 307 *e.*
proof of, by declarations of deceased persons, proved to be relations, 318 *c.*
between witness and a party, affecting credibility, 336 *d.*
affinity, slight kinds of, 320 *a.*
see *Will, statements in.*
RELATIVE of a party, not to act as a Commissioner to examine witnesses, 220 *e.*
testimony of, excluded by the Civil Law; but not by the Courts of Equity, 349 *g.*
RELEASE,
made as effectual to pass freehold estates, as a Lease and Release by the same parties, in England, 452 *d*; see *Lease and Release; Lease in Ireland.*
copy of, use of, as secondary evidence, 271 *b*; see *Lease for a Year.*
of interest to restore competency,
party declining to give, 355 *f.*
use and effect of, to restore the competency of a person as a witness, 371.
the giving, not always feasible, 372.
and re-examination of interested witnesses not allowed, 374.
form of, general or particular, 374-5.
offer of, or payment, to restore competency, proof of, 375.
offer of, to a witness, restores his competency, 375 *a.*
of a right, acceptance of, no acknowledgment of the right, 466 *b.*
RELEVANCY, 21 *b.*
or materiality of the question referred to, is to be considered, in deciding on sufficiency, 521; see *Decree, Insufficiency, Materiality.*
RELIEF; *Accident, Defects, Diligence, Forfeiture, Forgery, Fraud, Laches, Mistakes, Negligence, Omissions, Tampering, Trusts.*
RELIGION of a Witness; see *Chinese, Gentoo, Heretic, Infidel, Jew, Mahomedan, Quaker, Separatist, Turk.*

RELIGIOUS PRINCIPLES, of one proposed to be examined as a witness, 332 *c*; or want of such, see *Atheist*.
REMEMBRANCER, the King's (in the Exchequer), his duties, 165 *g*.
REMOTE INTEREST, as to incompetency caused by, 362-3.
REMUNERATION, to a witness, deposing as to his opinion, on a matter of skill, 101 *e*; see *Conduct Money*.
RENT,
accounts of, in handwriting of steward and his agent, though not signed by steward, admissible, 310 *b*.
rolls used and written in, though not signed by steward, admissible after his decease, 310 *b*.
payment of, operation as an admission, 463.
receipts for, (out of proper custody), may be evidence of seisin, 311 *f*.
when deed creating, lost, presumption arising from proof of payment, 479 *a*.
see *Agent, Bailiff, Clerk, Collector, Receipt, Payment, Receiver, Steward*.
RENTALS, ANCIENT, 453.
RENOUNCING AN OFFER, proof of, 478 *f*; see *Advantageous Offer*.
REPAIRS OF HIGHWAYS, certificates by justices as to, 254 *c*.
REPLEVIN; see *Landlord*.
REPLICATION,
(in suits) in Chancery, since the 17th of Richard the Second, found in the Tower, 151.
office copies of, 151 *c*.
filed, but no subpœna to rejoin served, effect of, 22 *c*.
not being filed, effect to admit statements in answer, 22.
effect when plaintiff is an infant, 22 *c*.
when such to be filed, 52 *b*.
effect as to the statements in the answer; present mode of joining issue, and form of, 238 *d*.
filed, to the answer of a defendant, precludes his examination as a witness, 506 *b*.
See *Warrant to Name Commissioners*.
SPECIAL, effect as to admissions, 22.
now out of use, 239 *b*.
REPLY, affidavits in, 544 *c*.
before the Master, Order as to, 512 *d*.
REPORT OF MASTER,
on a reference, under the Order, to take Accounts and make preliminary Inquiries, hearing not delayed for, 490 *a*.
that defendant had submitted to do a certain act, 505-6.
presumed, *primâ facie*, to be true, 506 *a*.
to falsify it an affidavit, at least, is necessary, 506 *a*.
warrant on preparing, no further evidence receivable after issuing, 513.
on exceptions to, all defendants may argue upon evidence produced by one, 517 *c*.
REPORT OF MASTER—*continued*.
it is not the course, to take to be right unless it can be shewn to be wrong; the Court requires the party in whose favour it is, to show how it is supported, 521 *d*.
when referred back to him to be reviewed, 521 *d*.
referred back to Master to review on allowance of exceptions, 521 *d*.
no new evidence allowed on the hearing of exceptions to, 521-2 *a*.
form and contents of, Order as to, 522 *b*.
settled, Master not to receive any further evidence, 522 *a*.
how made basis of future proceedings, and argued upon as indisputable, 522 *b*.
Office Copy of, signed by him, and kept at the Report Office, 152.
approving of a title, upon the allowance of exceptions to; see *Certificate of the sufficiency of an Examination; Scandal, Title*.
REPORTS; see *Common Report, Hearsay, Reputation*.
of cases decided in the House of Lords, or Courts below, as to the authority of each, 402.
opinions of Judges as to,
and decisions in Reports doubted, 402 *c*.
REPRESENTATIVES, bound by the admissions as well as all other acts of the person represented, 463 *g*.
REPUTATION, of third person, how protected from impertinent testimony, 86 *a*.
evidence of, to prove public or general rights, 305.
evidence of payment in consequence of, 305 *a*.
of witness, influence of, not ground for change of venue, 529 *a*.
RESIDUES of personal estate of testators dying before 1st of September, 1830, 294 *c*; see *Executors, Presumption as to*.
unascertained, affidavits as to 545 *d*.
RESIDUARY LEGATEE, as to competency of, 373.
RES INTER ALIOS ACTA, objection of, at Law, does not apply to an answer in Equity, 468 *c*.
RES JUDICATA, on the authority of, 476.
RETAIN, the bill, with liberty to bring an action, suit to be dismissed, if action not brought, 524.
RETAINER, attempt to use signature of, 267 *b*.
RETURN of subpœna to testify, *viva voce* at the hearing, 191 *f*.
RETURN DAY of a commission,
to examine witnesses, in Chancery, 110.
in Exchequer, 110 *f*.
execution after, irregular, 220 *c*.
REVENUE, frauds on, machinery to detect, not exposed (by evidence), 86.
Records relating to, 165-6.
REVERSAL OF A JUDGMENT, as to Infamy, 335.

REVERSION, purchaser of, must prove he gave a full price, 390 *a*.
REVIEW, Bill of, not proper, to rectify mistakes in not entering proofs as read, 534.
proofs in original cause not allowed to be used on, 537 *g*.
See *Bill of, Demurrer to, Supplemental Bill in Nature of a Bill of Review.*
of Master's Report,
referred back to him to, 521.
further evidence on, when, 521 *d*.
COURT OF, IN BANKRUPTCY,
may take evidence *vivâ voce*, or upon affidavit, before a Judge or a Master, 498 *a*.
See *Bankruptcy, Court of Review in.*
OF OPINION, on a Case sent to a Court of Law, 532.
REVIVAL OF A WILL, parol evidence of, rejected by the Ecclesiastical Court, 297 *a*.
REVIVOR, bill of, evidence not read on, costs of, 537 *e*.
REVOCATION of wills, 184 and 184 *a*.
proof of, 184 *d*; see *Wills*.
prior to 1838, by marriage and birth of a child, 300 *et seq*.
since 1837, 300 *e*.
(except certain made under powers), by marriage, 309 *e*.
RIGHT, alleged, in case of, *onus probandi*, 390 *a*.
declarations as to, *post litem motam*, 321.
evidence to support or negative, 246 *a*, 305 *e*.
of a defendant to an issue; see *Defendant, Issue*.
of heir-at-law to an issue; see *Heir-at-law, Issue*.
primâ facie evidence of; see *Onus Probandi*, 246 *a*.
public or general, proved by evidence or reputation; but private or particular not, 305 *b*.
not public, private but prescriptive, evidence of reputation as to, 307.
of ferry, evidence of reputation as to, 305 *e*.
of navigation, evidence of reputation as to, 305 *e*.
of way, evidence of reputation as to, 305 *e*.
user of, inference from, 474 *d*.
See *Ownership, Possession; Release of, Verdict as to.*
RINGS, inscriptions on, evidence of pedigree matters, 319 *b*.
ROAD ACTS, 408.
ROAD; see *Land, strips of.*
ROLLS; see *Court Baron, Court Rolls, Rent Rolls.*
fire at, 1618, 269 *c*.
Chapel, transcript of Acts of Parliament deposited at, 404 *b*.
ROMAN CATHOLIC, Prayer Books, entries in; see *Missals, Papists, Prayer Books.*
ROMISH PRIEST, certificate of baptism by, not evidence, 167 *f*.
ROYAL NAVY, wills of petty officers and seamen in (since 1837), 183.
ROYAL PROCLAMATIONS, judicially noticed, 408 *b*; see *Proclamation*.
RULES, as to evidence, in all Courts alike, 2; see *Accident, Courts, Fraud, Time, Trust.*
RULES OF LAW, presumption as to marriage and birth of issue, &c. operating as a revocation of a will, came to be deemed, 302.
evidence not admissible against, 303.
RUSSIAN LAW, an opinion as to, 448 *b*.

SAILOR, will of, since 1837, 183.
SAINT VINCENT'S, Court at, exemplification from, 155 *b*.
SALE, public; see *Auctioneer.*
SAMPLE, used as an exhibit, 146 *a*.
SANITY of a settlor, 182 *a*.
of a testator, the great fact to be proved by witness as to a will, 181-2.
cause postponed for proof of, 198 *i*.
further evidence as to, 199 *d*.
presumption as to continuance of, 474 *e*, 479 *c*; see *Insanity, Lucid Intervals, Lunacy, Mad, Memory, Testator.*
SATISFACTION, by will, presumption of, parol evidence admitted as to, 294 *b*.
of the Court, ground for a commission to examine witnesses abroad, 117 *i*.
SCANDAL,
and other impertinence, in interrogatories for the examination of witnesses, 58 *e*.
nothing which is pertinent is scandalous, 80 *d*.
is the worst species of impertinence, 86 *a*.
that is not deemed, which is not impertinence, 213 *b*; but see 215 *c*.
in general, Orders as to, 214 *et seq*.
any person aggrieved by, may complain of, 214.
as to such, being seditious also, *ib*.
the principle upon which the Court expunges such, 215 *a*.
how differs from mere impertinence, 218 *f*.
evidence as to general bad character, 234 *e*.
in articles to discredit a witness, or in affidavits supporting them, 206 *c*.
in depositions, 213 *b*.
ought not to be taken down, 76 *d*.
in an interrogatory,
a ground for demurrer, 80.
or in a deposition,
process to have suppressed, 214 *et seq*.
in matters before the Master, 513 *e*.
in affidavits, 543 *h*; see *Reference*.
reference for, 544 *d*; see *Suppression for.*
SCHEDULE, 156 *b*; see *Bankrupt and Insolvent Acts.*
SCIENCE, words of, in a written instrument, explainable by parol, 280 *c*; see *Mark, Medical, &c., Remuneration, Scientific, Skill, Witness.*

SCIENTIFIC FACTS,
notice taken of, 395-6.
MATTERS,
opinions as to, of competent persons, evidence of, 470 *a*.
WITNESSES,
weight of the testimony of, 469-70.
use of the testimony of, 479; see *Medical, Nautical, Remuneration*.
SCOTLAND,
Act to improve the Law of Evidence, not to extend to, 327.
affidavits sworn in, Act as to, 542.
Attorney in, 542 *b*; see *Attorney, Scotch*.
document being in, 274 *c*.
ancient objection, in civil causes, that a witness was a female; 331-2.
Lords of the Session in, sentence by, proof of, 154 *d*.
Great Seal of, instrument under, use of in peerage case, 410 *a*.
stat. 8 & 9 Vict. c. 113, as to printed copies of Acts of Parliament, &c., does not extend to, 410 *c*.
witness in, 122 *d*, 126*; see *Commissions to examine Witnesses in Scotland; Edinburgh; Marriages; Registers; Seal*.
SCRIVENER, testimony of, 380.
privilege as to, 388 *e*; see *Money raising*.
SCRUPLES OF A WITNESS, as to an oath, or the form or ceremony, how to be met, 65 *b*; see *Religion of a Witness*.
SEAMAN, will of (since 1837), 183.
SEA-SHORE, land being on, presumption as to what parish in, 479 *b*.
SEA-WALL, liability, *rationi tenuræ*, to repair, extent of, 236 *e*.
SEAL,
or Stamp, certain official or other documents, sealed with, 157-8; see *stat.* 8 & 9 *Vict. c.* 113; and see *Records, Registers*.
of a Corporation, to an instrument, memorandum of affixation, 174 *b*.
of any one of the Superior Courts, requires no further evidence, 153 *e*.
of any of the inferior Courts, to be proved by a witness, 154 *b*.
of a Court constituted by Act of Parliament, is proof of itself, 154 *c*.
when a Court has none, 154-5.
of private Court or person, 154 *c*.
of a Court, although much worn, if sworn to, may suffice, 155 *f*.
of deed, &c., detached, or broken, whilst deed, &c., in Court, 452-3.
Great, of England, 177 *b* and *c*.
of Scotland, 410 *c*.
of the Insolvent Court, 156 *b*.
Judicial, of the shires of Wales, or town and county of Haverford West, 413 *d*.
of Ordinary, being genuine, 443; see *Administrator, Probate; Will, proof of*.
of a Railway Company, 157 *b*.
of the States of Holland, 447 *d*.
SEAL,—*continued*.
of a place, or the principal officer of a place, to a certificate: see *Notary Public*.
SEALS, some recognised when they appear before the Court, 413.
SEALING
a deed, proof of, 176.
presumption of, 482.
up and transmission of depositions, 110 *c*.
of a Commission, to return, 110.
of the draft of depositions, 111 *c*.
of a Commission executed abroad, 120 *c*.
SEARCH, for lost document,
proof of, to let in secondary evidence, 269 *f*.
every reasonable, although not every possible, to be made, 269 *f*.
use of sufficient diligence in, 269 *f*.
for a witness, 252.
proof of due, 253; see *Absent Witness*.
SECOND TIME, examination of a person as a witness; see *Further and Re-examination*.
SECONDARY EVIDENCE,
defined, 247.
no degrees of, 247 *b*.
not admissible, without accounting for the non production of the best evidence, 248 *a*.
confined to what is good evidence, 268.
let in by an admission in the answer, 12 *a*.
not admissible when primary precluded by privilege, 87 *b*.
(as to credibility,) testimony of a Heathen, 247 *b*.
SECRECY
of the examination of Witnesses, in Chancery, by the Examiner, 67.
as to interrogatories, depositions, &c., to be kept by the Examiner, his clerks, &c., 71 *c*.
of the examination of witnesses, in Chancery, effect of, 74.
object of, 74 *d*.
as to the evidence until publication, 79 *k*.
importance of,
in the opinion of C. B. Gilbert, 92.
and of Lord Hardwicke, C. 92 *b*.
Commissioner and Clerk bound to, 111 *d*.
see *Confession; Priest; Private*.
SECRETS of former clients privileged, 379 *d*; see *Professional Advisers*.
SECRETARY OF A COMPANY, OR SOCIETY, custody of books, &c. 273 *d*.
see *Bankrupts*.
SECRETARY OF STATE, correspondence of, not admissible in evidence, 86 *g*.
SECRETARY AT WAR, certificate of, 253 *c*.
SECRETING of a Witness before cross-examination invalidates his depositions, 22 *b*.
SEISIN, evidence of, receipts for rent, out of the proper custody, may be, 311 *e*.
SELF-INTEREST a temptation to most men; which the old law, as to incompetency, guarded them from, 347 *b*.
SEMEL furibundus semper furibundus præsumitur, 479 *e*.

SENDING A LETTER, merchant's letter-book used to prove, 186 *c*; and see *Delivery*.
SENSES, objects of, decision as to, by Judges on examination and inspection, 449.
SENTENCE
of another Court, of competent jurisdiction, 430-1.
not collateral evidence, 444.
by visitors, 435.
of the Admiralty Courts, 445.
of a Court in Holland, exemplification of, 447 *d*.
see *Courts, Admiralty, Spiritual, &c.; Decree; Fornication; Jactitation of Marriage; Judgment; Foreign Verdict*.
SEPARATE ESTATE, of a married woman, evidence to affect, in the Exchequer, 51 *e*.
SEPARATIST, solemn affirmation by a witness being such, 65-6 *f*.
affirmations by, in lieu of oaths, 332 *e*.
declaration or affirmation of, 540 *h*.
SEQUESTRATION, 158 *b*.
SEQUESTRATOR, deceased, account by, evidence for the vicar, 311 *f*.
examination of persons, *pro interesse suo*, against, 519 *c*.
SERVANT, deceased, entry by, to be available, should have the effect of charging himself, 314 *d*.
or be made by himself, or in writing recognised by him, in the course of his duty, 314 *c*; see *Entries and Agent, Bailiff, Clerk, Collector, Shopman, Steward*.
as to incompetency of, in an action against his master, 364.
admitted as a witness, 367-8.
SERVICE, entry of, in a book, &c., by a deceased person in the performance of a duty, evidence of, 309 *g*.
of *subpœna*, to testify *vivâ voce*, at the hearing, to be personal, 191 *g*.
affidavit to prove, 538 *d*; see *Subpœna, Substituted Service, Summons, Witness*.
SETTLE; see *Case, Counsel, Interrogatories, Issue, Master, Settling Interrogatories*.
SETTLED ACCOUNT, inquiry as to, 490 *c*.
SETTLEMENT, proof of, 186 *f*.
lost, what sufficient search for, 269 *c*.
reformed, when mistake proved, 289 *f*; see *Articles*.
cases, Prayer Books, entries in, frequent use of, 319 *g*; see *Parishioners rated*.
SETTLING Interrogatories, by the Master, all the parties who have any interest are allowed to attend at, 516 *b*.
SEX, female, in Scotland, an objection to a witness, but not in England, 331-2.
SEXTON, deceased, entry in parish book by, 309 *g*.
SHARES; see *Funds, Stock*.
SHERIFF, bill of cravings of, record of, 165 *g*.
certificate of, 253 *d*.
SHERIFF—*continued*.
duty of, to do execution on criminals, not relating to a Public right, 305 *c*.
SHIPPING; see *Lloyd's List*.
SHIPS; see *Register of*.
SHOP-BOOKS not necessarily evidence, even after the year, 314 *g*.
see *Stat. 7, Jas. I. c.* 12.
SHOPMEN, since deceased, entries in books, &c. by, evidence of, admissible, 313 *e*.
SHORT-HAND-WRITER, notes of, use of, 258.
notes by, of proceedings, affidavit to verify, impertinent, 543 *h*.
SICK, witness being, how examinable, 250.
SICKNESS, of a witness, as letting in secondary evidence, 249.
proof of, 250.
see *Imbecile; Impotent, &c.; Medical, &c.; Witness, sick*.
SIGHT, power of, in the Court, or an Officer, or a Witness, use of glasses to assist, 267 *c*; see *Attorney General, Blind Person, Erasures, Inspection, Magnifying Glass, Microscope, Register*.
SIGNATURE,
Act dispensing with proof of, to certain documents and copies, 157-8.
of a person in an official situation, is not necessarily evidence, 159.
of Deeds, &c., proof of, 146, 157-8.
of Wills, since 1837, 182.
genuineness of, 264 *c*; see *Deeds, Instruments, Signing, Wills*.
to entries in books, &c., by persons since deceased, not essential to the admissibility of such, 310 *b*; see *Entries, &c.*
to an instrument, presumption of, 482; see *Attestation*.
of a Judge, 159 *c*; see *Statute as to*.
judicial, notice of, 413 *h*.
to authenticate an exemplification, from a Court having no seal, 154-5.
the Judges, instead of the seal of the Court, treated as nullities, 159.
and Seal of the Custom House Court of St. Petersburgh, 448 *b*.
of the Master of the Queen's Bench, 164 *d*.
official, proof of, 264 *d*; see *Official and other Documents*.
of proper officer, to office copies, 152.
of the officers of the Insolvent Court, 156 *b*; see *Signed, Stamp*.
being genuine, proof of, 264 *c*; see *Handwriting, Writing*.
proof of, why slight, sometimes admitted, 264 *d*; see *Marks, Marksman, Record, Register, Stamp*.
to an affidavit, 543 *e*.
of a witness,
to his Depositions, in Court,
in the presence of the Examiner, 66.
before a Commissioner, 106 *d*.
absolutely essential, 106 *d*.

SIGNATURE—*continued.*
see Commissioner, Depositions, Drafts, Engrossment, Office Copy, Paper, Parchment, Witness.
comparison of, 267 *b*; see *Will; Collation of Seals and Signatures.*
SIGNED, document or copy, receivable in evidence, by any Act of Parliament, 157-8.
SIGNING a Deed, proof of, 146, 177 *f.*
primâ facie evidence of sealing and delivery, *ib. g.*
presumption of, 177-8 *a.*
an Instrument not sealed, proof of, 178.
a Will, since 1837, 182; see *Attestation, &c., Signature, Signed.*
SIMILITUDE of handwriting, even with a probable disposition, not sufficient in the Ecclesiastical Courts, 267 *b.*
SIMONY, witness not bound to admit, 83 *d.*
SINGLE; see *Witness and Corroboration*, 4.
Witness; C. B. Gilbert's observations, as to when such sufficient, 5 *b.*
when and why insufficient, *ib.*
unsupported testimony of, insufficient, against a distinct and positive assertion in the Answer, 4 *et seq.*, 227 *a.*
the testimony of (though supported), when answer stands opposed to, defendant may claim an issue as of right, 523 *h.*
see *Answer; Englishman, right of; Issue; Jury; Perjury; Testimony.*
SITUATION OF PROPERTY, extrinsic evidence of, to explain will, 283 *c*; see *Parcels.*
SIX CLERKS,
Order substituting Solicitors for, 89 *d.*
OFFICE, fire at, 269 *c.*
SKILL, witness deposing as to a matter of, 101 *e*; see *Remuneration, Science.*
SLIPS, in proceedings, &c., consequences of, how remedied, 197-8-9 *k*; see *Accident; Counsel, errors of; Errors; Mistakes; Omissions; Solicitors, errors of.*
SMUGGLING, Bankrupt not bound to admit, 83 *h.*
SOLDIER, being ordered abroad, examined as a witness *de bene esse*, 121 *g.*
will of, since 1837, 183.
SOLICITOR,
"a crafty," (who) "may lie in the lurch," Lord K. North's rule, for the prevention of, 140-1 *a.*
bills and books of; see *Attorney.*
books of, use of entries in, as secondary evidence of a deed, 271 *c.*
bill against, for a general account and taxation of his costs, 512 *f.*
concerned in the cause, acting for parties having different interests; observations on, by Lord Eldon, C., and Sir Edward Sugden, C. of Ireland, 319 *d.*
concerned in the cause, not to act as a Commissioner to examine witnesses, 101 *a.*
SOLICITOR—*continued.*
appointed a Commissioner, unjustified in acting for a party, 220 *e.*
of a party acting as Commissioner, irregular, 220 *e*, and forbidden, *ut supra*, 101 *a.*
of a third person interested, not thereby precluded from acting as a Commissioner, 220 *e.*
concerned in the cause, Clerk of, not to act as Clerk of Commissioners, 220 *f.*
and his Clerk also, though a Master Extraordinary, precluded from acting as such, 541-2 *a*
duty of, as to evidence, 213.
as to witnesses, 221 *i.*
communications of, with a witness; observations of Lord Langdale, M. R., as to what necessary, what proper, and what improper, 221 *i.*
restricted in his testimony, 378-9.
having been willingly guilty of a breach of professional confidence; animadversions of Sir Edward Sugden, C. of Ireland, upon, 379 *d.*
errors of, cases of, defects supplied, 197-8-9.
ordered to pay costs, occasioned by delay, 138 *c.*
error of, costs occasioned by, ordered to be paid by his client, 222 *a.*
family, witness as to handwriting of a member, 267 *b.*
may prepare interrogatories to be settled by the Master, 516 *a.*
(admissions and other) agreements by, on behalf of their clients, 47 *b.*
being infants, 51 *c.*
preliminary meeting of, suggestions and mutual communications between, on a reference to a Master, 503 *a.*
see *Accounts, process of taking; Attorney.*
Order substituting, for Six Clerk, 89 *d.*
verbal inquiries of, in Court, and answers, on hearsay, by, 500 *b.*
SON, conveying an estate to his Father, parol evidence not admissible to show a trust, 292 *b*; see *Advancement, Bastard, Heir, Pater est quem, &c.; Relative.*
SORTING, &c., 135 *b*; see *De bene esse, Commissions; Witnesses.*
SOUND; see *Unsound Mind.*
SOVEREIGN, of another realm, must answer a cross-bill, on his oath, 65 *f.*
seal of the, 177 *b*; see *Crown, King, Queen, Seal.*
not appearing as a witness, 254 *f*; see *King, Proclamation, Queen.*
SPAIN, custom in, to deposit deeds, 149 *c.*
SPEAKER, certificate of, as to costs, 439.
SPECIAL CASES, of indulgence by the Court, 195; see *Accidents, Accounts, Errors, Frauds, Mistakes, Omissions, Trusts.*
CIRCUMSTANCES to induce the Court to alter the usual Order for an Issue, 524 *f.*

SPECIAL—*continued.*
COMMISSION, TO EXAMINE WITNESSES, (old practice) as to time and place of executing, 169 *d.*
JURY, on the trial of an Issue, Motion for, 524 *e.*
ORDER, evidence used by, 194, *et seq.*; see *Order; Special cases.*
REPORT, as to Interrogatories settled by the Master, 520; see *Report.*
SPECIFIC PERFORMANCE, amendment of a bill for, 28.
SPECIFIC PERFORMANCE OF AN AGREEMENT, in a suit for,
proof of the agreement, 243-4.
the agreement being in writing, the Court not adding any circumstance which parol evidence would introduce, 278 *a.*
as to parol evidence to resist, 287 *a, ad finem.*
defendant may show that the plaintiff is not entitled to the relief prayed, 290.
inquiry as to title, 490 *a*; see *Title.*
SPECULATIVE QUESTIONS, Court of Law, on a Case sent, will not answer, as to, 531 *h.*
SPELLING, bad, used as a test of the genuineness of handwriting, 266 *c.*
SPIRITUAL ADVISER, communications to, not privileged, 381 *c*; see *Clergy, Priests.*
SPIRITUAL COURT, Sentence in, of Divorce, *a mensa et thoro*, 164 *c.*
see *Courts; Ecclesiastical Courts.*
SPOLIATION, in cases of, rules as to evidence, 6 *a.*
SPOLIATION OF DEEDS, &c.; see *Destruction, Fire,* In odium spoliatoris.
STAMP ACTS, effect of, 391 *a.*
STAMP,
principal Acts as to, are stat. 55 Geo. 3, c. 184, and stat. 3 Geo. 4, c. 117.
Lord Eldon's observations on, 391 *b.*
see *Statutes.*
want of proper stamp to a document not cured by Admission, Consent, or Waiver, of the other party, 49 *c*, 391 *h.*
wanting, secondary evidence of an instrument, not admissible, 391 *h.*
objection for want of, not waivable by the parties, 391 *b.*
to lost document, *primâ facie* evidence of, 272 *e.*
to lost instrument, presumption as to, 482 *e.*
see *Agreement, Court Rolls, Instrument, Letter, Receipt.*
document or copy impressed with, 157-8; see *Official and other Documents.*
STAMPS, COMMISSIONERS OF, copy of entry in books of, 159 *b*; see *Legacy Duty, Commissioners of.*
STANDING OVER of a cause, to remedy a fault, 189 *i*, 226.
see *Cause stands over.*
STAR CHAMBER, complaint against, not
STAR CHAMBER—*continued.*
allowing evidence in, to impeach credit, 204 *a.*
STATE AFFAIRS,
documents relating to, copies of, 169 *b.*
see *Secretary, of State, at War.*
privileged from inconvenient disclosure, 86 *g*, 377; see *Government, Official, Public.*
see *Gazette; Government; Official; Public; Secretary.*
STATE OF FACTS, laid by a party before a Master, 504.
amendment of, 504 *e.*
proceeding to evidence upon, 504 *e*, 505 *c.*
throwing an affirmative issue on the defendant, 505 *a.*
NEW, and further examination thereon, without an Order, 518 *c.*
see *Counter Statement.*
STATEMENTS
(in the pleadings, or other matters before the Court,) even as to matters in issue, to be fair, not scandalous and libellous, 215 *c*; see *Impertinence, Libel, Scandal.*
in bills; see *Bill, Statements in.*
certain, affidavits to verify, 538.
in answers; see *Answer, Admissions in, Statements in.*
in a bill, occasion for, 16 *e.*
although fictitious, excuse for, 16 *e*, 427.
efficacious for the eliciting of truth, 427.
but when proved to be untrue, 151 *a.*
false; see *Misstatements; Suggestions.*
of agreements, 243; see *Specific Performance of Agreement.*
by a witness, on other occasions, 204 *d*; see *Impeach the Credit of a Witness.*
of witnesses being prepared for them, 220 *h*; see *Affidavits Prepared for Witnesses, Defendant, Memory.*
as to pedigree,
received by the College of Heralds, 316 *i.*
of relations since deceased, 316, *et seq.*
made *post litem motam*, 322 *f.*
with a view to a controversy, 323, *et seq.*
by a person *in pari casu*, 324.
not cotemporaneous, 324.
identity of persons having made, necessary to be proved, 325 *b.*
see *Admissions, Declarations, Deeds, Entries in Books, &c., Hearsay, Husband and Wife, Parsons, Pedigrees, Recitals, Statute, Suggestions, Tithes, Wills, Writing.*
STATUARY, terms used by; see *Technical Terms.*
STATUTE,
recital in, as to private facts, 398 *g.*
preamble of, weight due to, 398-9.
quoted at any stage of the proceedings, 404.
read from a book, purporting to be printed by H. M. Printer, 404 *d.*
date of, 407.
pleading of, 405-6.
see *Frauds, Limitations, &c.*

STATUTE—*continued.*
private, not available in evidence against one not a party thereto, 421 *e*.
STATUTES
cited, or referred to, in this edition, *viz.*:—
17 Rich. 2 (Costs, &c.), 151 *a*.
9 Hen. 6, c. 4, s. 2 (Bastardy), 440 *c*.
23 Hen. 8, c. 15 (Pauper Suitors non-suited), 151 *a*.
27 Hen. 8, c. 16 (Bargain and Sale), 417 *d*.
1 & 2 Ph. & M. c. 13 (Examinations), 262.
2 & 3 Ph. & M. c. 10, *ib*.
18 Eliz. (Bastards, Poor), 5 *b*.
7 Ja. 1, c. 12 (Shop Books), 314 *f*.
21 Ja. 1, c. 19, s. 6 (Bankrupt), 343-4 *a*.
19 Car. 2, c. 6 (*Cestuis que vies*), 482.
29 Car. 2, c. 3 (Frauds), 277 *b*.
29 Car. 2, c. 3, s. 5 (Wills), 180 *c*.
7 & 8 Wm. 3, c. 34 (Affirmations), 66-7 *f*.
2 & 3 Anne, c. 4, s. 8 (Registry), 157 *a*.
6 Anne, c. 18 (Persons whose deaths suspected), 483.
6 Anne, c. 35, ss. 11, 17 (Registry), 157 *a*.
7 Anne, c. 20, s. 6 (Registry), 157 *a*.
9 Anne, c. 14, s. 5 (Gaming), 334.
9 Anne, c. 18, s. (Minors), 450 *b*.
10 Anne, c. 18, s. 3 (Enrolment), 157.
7 Geo. 2, c. 30 (Mortgage), 503 *e*.
8 Geo. 2, c. 6, s. 12 (Registry), 157 *a*.
9 Geo. 2, c. 36 (Charitable Uses), 157 *a*.
9 Geo. 2, c. 36 (Enrolment), 417 *c*.
14 Geo. 2, c. 16 (Recoveries), 483.
13 Geo. 3, c. 63 (Witness in India), 125, 126 *a*.
26 Geo. 3, c. 57, s. 37 (India), 265 *a*.
31 Geo. 3, c. 35 (Infamy), 334 *b*.
36 Geo. 3, c. 52, s. 27 (Legacy Duty), 159 *f*.
38 Geo. 3, c. 78 (Newspapers), 155.
46 Geo. 3, c. 57 (Witness owing a debt, or liable to an action), 84 *b*.
50 Geo. 3, c. 164 (Examiners), 53 *a*, 71 *a*.
52 Geo. 3, c. 101 (Charities), 511 *e*.
53 Geo. 3, c. 102, s. 24 (Insolvents), 156, *ib. b*.
53 Geo. 3, c. 127 (Excommunication), 334 *a*.
55 Geo. 3, c. 146, ss. 6 & 7 (Registers), 268 *c*.
55 Geo. 3, c. 184 (Stamps), 391 *b*.
1 Geo. 4, c. 119, s. 45 (Insolvents), 156 *a* and *b*.
1 Geo. 4, c. 119 (Insolvent), 190.
3 Geo. 4, c. 117 (Stamps), 391 *b*.
6 Geo. 4, c. 16, s. 37 (Bankrupts), 344 *a*, (Bankruptcy Fiat), 436 *e*.
6 Geo. 4, c. 16, s. 92 (Bankruptcy, depositions in), 263.

STATUTE—*continued.*
6 Geo. 4, c. 16, s. 97 (Bankrupts), 157.
6 Geo. 4, c. 16, s. 126 (Bankrupt's certificate,) 438 *e*.
6 Geo. 4, c. 16, s. 131 (Bankrupts), 277 *b*.
6 Geo. 4, c. 87, s. 20 (Notary, Consul), 254 *f*, 541 *f*.
7 Geo. 4, c. 46 (Banking), 255 *b*.
7 Geo. 4, c. 57 (Insolvents), 156 *bis*.
7 Geo. 4, c. 64 (Examinations), 262.
7 & 8 Geo. 4, c, 28, s. 12 (Pardon), 334 *d*.
7 & 8 Geo. 4, c. 29, s. 2 (Infamy), 334 *b*.
9 Geo. 4, c. 14 (Agreements), Lord Tenterden's Act, 277 *b*.
9 Geo. 4, c. 32 (Affirmations), 66-7 *f*.
9 Geo. 4, c. 32 (Quakers), 332 *e*.
9 Geo. 4, c. 32 (Pardon), 334.
10 Geo. 4, c. 50, s. 53 (Enrolment), 166 *a*.
11 Geo. 4, and 1 Wm. 4, c. 40, (Residues), 294 *c*.
1 Wm. 4, c. 22 (Interrogatories, examinations on, &c.), 125.
(Witnesses in Colonies), &c., *ib*.
1 Wm. 4, c. 22, s. 4 (Interrogatories), 251 *c*.
2 & 3 Wm. 4, c. 71 (Rights), 474 *d*.
2 & 3 Wm. 4, c. 71 (Prescription), 476 *c*.
2 & 3 Wm. 4, c. 100 (*Modus Decimandi*), 476 *c*.
3 & 4 Wm. 4, c. 27 (Limitations), 476 *c*.
3 & 4 Wm. 4, c. 42, ss. 26-7 (Incompetency) 336, 348 *c*, 359 *c*.
3 & 4 Wm. 4, c. 49 (Affirmations), 66-7 *b*.
3 & 4 Wm. 4, c. 49 (Quakers), 332 *e*.
3 & 4 Wm. 4, c. 74 (Fines and Recoveries), 418 *b*.
3 & 4 Wm. 4, c. 74 (Fines, &c., England), 480 *c*.
3 & 4 Wm. 4, c. 82 (Affirmations), 66-7 *f*.
3 & 4 Wm. 4, c. 82 (Separatists), 332 *e*.
3 & 4 Wm. 4, c. 94, s. 27 (Examiners), 65 *d*.
3 & 4 Wm. 4, c. 94, s. 27 (Depositions), 68 *d*.
3 & 4 Wm. 4, c. 94 (Depositions), 74 *a*.
3 & 4 Wm. 4, c. 94, s. 13 (Master), 137 *f*.
3 & 4 Wm. 4, c. 106 (Inheritance), 179 *d*.
4 & 5 Wm. 4, c. 76, (Poor, Bastards), 56 *b*.
4 & 5 Wm. 4, c. 83 (*Modus decimandi*), 476 *c*.
4 & 5 Wm. 4, c. 92 (Fines, &c., Ireland), 486 *c*.

STATUTES—*continued.*
5 & 6 Wm. 4, c. 54 (Marriages), 83 *a.*
5 & 6 Wm. 4, c. 62, s. 18 (Declarations in lieu of Oaths), 461 *a*, 540 *a.*
6 & 7 Wm. 4, c. 85 (Marriages), 307 *e.*
6 & 7 Wm. 4, c. 86 (Registers), 167 *f*, 250 *a.*
7 Wm. 4, and 1 Vict. c. 26 (Wills), 180 *c*; fully set out, 182, *et seq.*, cited, 276 *f*, 297 *b*, 303 *c*, 452 *d.*
1 Vict. c. 28 (Limitations), 476 *c.*
1 Vict. c. 76, s. 49 (Charter), 476 *a.*
1 & 2 Vict. c. 77 (Affirmations), 66-7 *f.*
1 & 2 Vict. c. 77 (Dissenters), 332 *e.*
1 & 2 Vict. c. 94 (Public Records), 147 *d.*
1 & 2 Vict. c. 94 (Records, custody of), 169 *b.*
1 & 2 Vict. c. 94, s. 13 (Public Records), 410, 415, 420 *c.*
1 & 2 Vict. c. 105 (Affirmations, and other Forms of Oaths), 65-6-7 *b.*
1 & 2 Vict. c. 110, s. 105 (Insolvents), 156 *b.*
3 & 4 Vict. c. 26 (Evidence), 313 *d.*
3 & 4 Vict. c. 92 (Registers, &c.), 158 *a.*
3 & 4 Vict. c. 92 (Non-parochial Registers, so called), 167 *f.*
(Fleet Register), 168 *b.*
3 & 4 Vict. c. 92, ss. 6 & 9, referring to ss. 18 and 19, (Non-parochial Registers, so called), 316 *h.*
4 Vict. c. 21 (Lease and Release), 173 *f.*
4 Vict. c. 22 (Lords), 334 *d.*
4 & 5 Vict. c. 40 (Stamps), 391 *b.*
5 Vict. c. 5 (Exchequer), 8 *f*, 421 *a.*
5 & 6 Vict. c. 69 (Perpetuating testimony), 134-5.
5 & 6 Vict. c. 116 (Insolvents), 174 *a.*
6 & 7 Vict. c. 72 (Stamps) 391 *b.*
6 & 7 Vict. c. 82 (Scotland and Ireland, affidavits in), 542-3.
6 & 7 Vict. c. 85 (The Act for improving the Law of Evidence) 325, set out fully, 326-7, and cited, or referred to, 50 *b*, 80 *e*, 175 *a*, 183 *a*, 206 *c*, 325-6, 335, 337 *b*, 347 *b* & *c*, 348 *c*, 394 *a*, 471 *d*, 506 *b*, 545 *c.*
See *Credit, Crime, Examination, Husband, Incapacity, Incompetency, Infamy, Interest, Landlord, Lessor, Party, Pardon, Replevin, Wife, Wills, Witness.*
7 Vict. c. 1 (Stamps), 391 *b.*
7 & 8 Vict. c. 21 (Stamps), 391 *b.*
7 & 8 Vict. c. 76 (Property), 173 *f.*
8 & 9 Vict. c. 106 (Property), 173 *f.*
8 & 9 Vict. c. 112 (Terms of Years), 477 *c.*
8 & 9 Vict. c. 113, s. 1 (Official and other Documents), set out, 157-8.
s. 2 (Signature of a Judge), 154 *g*, 159 *c*, 396 *b.*

STATUTES—*continued.*
8 & 9 Vict. c. 113, s. 3 (Copies of Acts of Parliament, &c. printed, &c), set out, 148-9.
8 & 9 Vict. c. 113, cited or referred to, 147 *f*, 154 *e*. 255 *b*, 396 *b.*
8 & 9 Vict. c. 124, s. 3 (Conveyancing, Fees for), 60 *a.*
STATUTES,
of Great Britain, printed copies of, conclusive evidence in Ireland, 406.
of Ireland, printed copies of, evidence in England, 407 *a.*
exemplifications of, how made, 411 *b.*
see *Acts of Parliament Printed*; *Records.*
STATUTORY declarations, under the Act for the Suppression of Extra-judicial Oaths, 460-1.
limitations, presumptions from, 476; see *Limitations, Prescription.*
STAY CERTIFICATE; see *Certificate of a Bankrupt.*
STEAM ENGINE, patent rights as to improvements in, 455.
STEWARD,
account of, adopted and audited, is evidence, 249 *a*; see *Entries.*
deceased, entries in books, &c., by, 310 *b.*
in his own favour, unconnected with entries against him, not admissible, 310 *f.*
showing a balance in his favour, yet entries against himself, admissible, 310 *b.*
proof of authority to, to let in entries by, 313 *a.*
deceased; see *Entries, Rent Rolls.*
of the Crown lands, 165 *g.*
of former owner, books of, admissible between parties who claim, both through, and one under, him, 464 *a.*
of a manor, 155 *e*; see *Copyholder.*
STOCK, acceptance of, proof of, 166 *c*; see *Bank Book.*
transfer of, under certain circumstances, accompanied by a declaration of the intention of the transferor, since deceased, gift of, 313 *d.*; see *Distringas.*
STONES, agreement to win, explanation of, 280 *f.*
right to dig; see *Wastes.*
SUBMISSION to do an act before the Master, his report certifying, 505-6; see *Admissions.*
SUBPŒNA ad testificandum and *Subpœna duces tecum*, Forms of, and Orders as to, 64 *a.*
duces tecum, effect of service of, 64 *a.*
why solicitors unwilling to serve a witness with, 77 *a.*
ad testificandum, and *duces tecum*, when requisite, service, &c., 101 *c.*
when a witness should be served with, 107.

SUBPŒNA—continued.
necessity for, when documents in possession of persons not parties, 274 *c*, 275 *c*.
effect of disobedience to, 275 *c*.
to witness to prove exhibits *viva voce*, return, service, &c. 191.
affidavit of service of, to satisfy the officers of the Court, 538 *d*.
to testify *viva voce* in Court, or to testify before the Master, form, 53 *d*, 507 *e*.
to hear judgment, 145 *h* and *i*.
SUBSCRIBING an Instrument, not necessarily proof of attestation, 174 *a*; see *Signature*.
WITNESS to unattested instrument, not being a will, one to be examined, 176.
although an attorney, not privileged from testifying, 384 *c*.
see *Attesting Witness*.
SUBSIDIARY EVIDENCE; see *Extrinsic, Parol, Secondary*.
SUBSTANCE to be proved, 239.
SUBSTITUTED SERVICE, of notice of applications for a commission to examine abroad, 112 *g*, 115 *f*.
SUBSTITUTION
of legacies, presumption as to, 294-5.
of a gift for a legacy, parol evidence as to, 300.
of a provision by a will for that by a settlement; of a provision by a settlement for that by a will, 300 *d*.
SUFFICIENCY of evidence to prove a fact, 239 *a*; see *Proof*.
no limit to the number of witnesses, 238 *c*; and see *Insufficiency*.
SUGGESTIONS in a bill proved untrue, penalty on the defendant, 151 *a*; see *Bill; Statements; Statute (Costs, &c.)*
SUIT, admissions for the purposes of, 457; see *Attorney, Solicitor, Agreements by*.
directed by the Court, 492 *a*.
see *Abatement, Answer, Bill, Cause, Cross-cause, Deposition, Hearing, Judgment, Production*.
SUMMONS, in a Real Action, evidence necessary to prove, 5 *b*.
OF A COMMISSIONER, to secure the attendance of a witness, 101 *b*.
why insufficient, if the witness disregards it, 101 *c*.
TO A WITNESS to attend and testify before a commissioner, and to produce a document, 107 *d*: see *Subpœna*.
SUNDAY (Old practice) not included in computing the number of days' notice of executing a commission, 93 *a*.
SUO MOTU; see *Judicial cognizance*.
SUPERANNUATED PERSON; see *Guardian (quasi), Imbecile*.
SUPERFLUITY; see *Impertinence, Prolixity*
SUPERFLUOUSNESS, no palliation of forgery of evidence, 245-6.
SUPERSEDING of a special commission, improperly issued, 105 *d*.
SUPPLEMENTAL ANSWER, 196; see *Supplemental Examination*.
SUPPLEMENTAL BILL, (or bill in the nature of a bill of supplement,) resource when further amendment precluded, 28.
to supply defects or omissions of proof, 196 *c*, 197 *a*.
to supply omissions of proof, demurrer to, effect of, 197 *d*.
to have the benefit of inquiries under the late order, 490 *a*; see *Inquiries*.
in the nature of a bill of review, Order as to, 537, *e*.
one being so called, but being, in fact, one of revivor only, 537 *e*.
a new bill, and has like incidents, as to evidence, 537 *e*.
see *Bill of Review*.
SUPPLEMENTAL
EXAMINATION to correct a mistake, 518 *c*.
SUIT, affidavits used in an original suit, may be used in, 537 *e*.
witness not to be examined in, as to matters in issue in the original suit, 221 *f*.
SUPPRESS for irregularity, too late to move to, after exhibiting articles to discredit the witness, 206 *c*.
SUPPRESSED, the depositions of a witness having been, order for re-examination obtained, cross-examination, as well as the examination in chief, to be repeated, 203 *f*.
depositions having been, for irregularity, in what cases they may yet be used, 224 *g*, 225 *a*.
SUPPRESSION
OF DEPOSITIONS GENERALLY, 213, *et seq.*
for Irregularity, Orders as to, 224.
not after exhibiting articles to discredit, 219 *b*.
taken under a commission as to payment of costs of, 127, *a*.
before the hearing, practice, in Ireland, as to, 219 *b*.
OF EXAMINATIONS,
for irregularity in taking, 219 *et seq.*
OF INTERROGATORIES, cross, for irregularity, must be before publication, 219 *b*.
see *Depositions; Expunging*.
SURETY, answer of principal, use of, against, 428.
SURGEON,
certificate of, 121 *d*.
affidavit by, to prove illness of a witness, 255.
OF A POOR LAW UNION, entries by, 310 *b*, see *Accoucheur, Medical Attendant, Professional Witness, Remuneration, Science, Skill, Sickness*.
SURPRISE, or Accident, grounds for leave to re-examine a witness, 200.
may justify delay, 226.
ground for indulgence, 231 *a*.
a new trial, 528 *d*.

SURRENDER OF COPYHOLDS,
by power of Attorney, Court Roll, secondary Evidence of the power, 271 *c*.
recital of, in Record Book of the Manor, used as evidence of it, 271 *a*.
see *Copyhold, Court Rolls*.
SURVEY, and marginal note thereon, use of, in evidence, 166 *a*, 308 *f*; and see *Maps*.
COURT OF; see *Presentment*.
ECCLESIASTICAL AND PARLIAMENTARY, use of, as evidence in tithe suits, 312 *e*.
SURVIVORSHIP, cases of, doubtful, presumptions in, 487.
no presumption as to, in the Ecclesiastical Courts, 488 *a*.
SUSPENSION; see *Universities, books of; Sentence, Visitor*.
SWEARING AFFIDAVITS of illiterate and ignorant persons, mode of, in the Exchequer, 540 *b*.
SWEARING WITNESS, formerly before the Master, but now before the Examiner or Commissioner, 65 *d*; see *Commissioner, Examiner, Oath*.
SWEDEN, commission to examine witnesses in, 118 *f*.
examination of witnesses, *de bene esse*, in, 124 *g*.
SWORN
CLERK; see *Commissioner, Clerk, Examiner*.
COPIES of documents, 148 *e*, 149; and see *Copies, Examined Copies*.
of a record, 159.
how prepared, *ib. e*.
not (merely) secondary evidence, 164.

TAMLYN, Mr., his Law of Evidence referred to, as to certain Marriages, 83 *a*, as to Wills, 182 *c*.
TAXATION OF COSTS, of and as to Evidence, order as to, 193.
TECHNICAL WORDS, or expressions, in any instrument in writing, explainable by parol, 280 *c*.
TENANT OF PREMISES sought to be recovered in ejectment, not rendered competent by the Act for improving the Law of Evidence, 327 *b*.
payment of rent by, is *primâ facie* evidence, against him, of the landlord's title, 463; see *Declarations by*.
TENDER, proof of, 242, *ib. c*.
in Court of Admiralty, 243 *b*.
of evidence rejected, notice being taken of, 536.
of expenses to witness served with *subpœna* to testify, 191 *g*; see *Conduct Money*.
TENOR of Record certified, 412 *a*.
TENTERDEN'S ACT (stat. 9 Geo. 4, c. 14), as to certain agreements being in writing, 277 *b*.
TENURE in a Manor, proof of, 235 *i*.
TERMS of years, presumption as to, 476-7.
TERRIER, copy of, not admissible, 167 *d*.
proof of, 186 *f*.
TERRIER—*continued*.
use of, as evidence, in tithe suits, 312 *e*.
conflicting, 312 *e*.
not conclusive, 312 *e*.
proper repositories for, 313 *c*; see *Custody*.
TESTAMENT; see *Instrument, Will*.
TESTAMENTARY Documents, in construction of, testator presumed to know the rules of law, 474 *b*.
Instrument by *feme covert*, in execution of a power, proof of, 178 *e*.
Cause; see *Prerogative Court*.
Guardian; see *Guardian*.
TESTATOR,
books of, entry in, by himself, use of, in proof of a gift,—a claim,—a discharge of a debt, 310 *b*.
declarations by, evidence of,
against executor, 313 *d*.
to explain a will, 283 *d*.
expressions by, evidence of,
to explain will, 284 *c*.
sanity of, interrogatories to prove, leave to exhibit, and hearing adjourned, 198 *i*.
probate copy of will, evidence of, as to his personalty, 444 *a*.
competency of, to dispose of personalty, probate copy of will is evidence, *ib*.
parent, or person, *in loco parentis*, of, or to, legatee, presumption arising, 298.
presumed to know the rules of law, 474 *b*.
heir-at-law to, issue whether one is, 523 *a*.
debt to, from executor; see *Executor, examination of*.
intention of; see *Extrinsic Evidence and Parol Evidence to explain Wills*.
see *Assets; Debt to; Executor, as representing; Habit of; Property of; Portion; Sanity, Will*.
TESTIFICANDUM; see *Subpœna ad test*.
TESTIMONY
of certain witnesses, not evidence, 80 *i*.
see *Incapacity; Incompetency*.
of a single witness will prevail,
if corroborated by circumstances, 227 *c*.
of the Sovereign, 254 *f*; see *Princes, assertions of*.
of a Witness, on a former trial at Law, use of, as secondary evidence, 258.
available to supply any defect in a document, when writing is not made essential, as evidence, 216 *c*.
truth of, 325: see *Credibility, Credit*.
credit due to, considerations as to, remarks of C. B. Gilbert respecting, 471-2.
and Discovery, analogy between, as to compelling, 82.
perpetuation of, 129.
preservation of, *ib. a*.
Act for perpetuating, 134-5.
see *Consistent; Contradictory; Jealousy of; Perpetuation of, Suit for; Single Witness; Witness, Corroboration of*.
TEXT-BOOKS, authority of, 403.
THIEVES, loss of deeds by, 269 *c*.

THINKING handwriting like, no evidence, it must be belief sworn to, 265 *d*; but see *ib. c.*
see *Opinions.*
TIMBER, right of Lord (of the Manor) to, evidence of reputation, as to, 306 *c.*
right to, proof of, 235 *d*; see *Declarations by Tenant.*
TIME, after lapse of, on taking accounts, rules as to evidence relaxed, 6 *a.*
within which parties are to take any certain proceeding or proceedings, before the Master, 502.
for filing affidavits, 544 *b.*
to examine as to competency and credit, 330 *d*; see *Competency and Credit.*
and place; see *Commission, Special.*
TITHES,
in London, decree for, 165 *d.*
collector of, entries in books of, 312 *d.*
proof of the writer of an entry, &c., being, 189.
as to, usage evidence of an exemption, and later usage of one antecedent, 236 *e.*
exemption from, by having belonged to privileged orders, evidence of, 312 *e.*
payment of, operating as an admission, 463.
receipt of, evidence against the receiver of his being the Parson, 463 *f.*
receipts for, by the Parson, may be evidence for his successor, 311 *f.*
right to, evidence of reputation as to, 307 *a.*
in general, claim of, proof of particular right to, 245 *b.*
suits, use in, of depositions in former suits, 261 *c.*
evidence in suits for, Accounts, Books, Ordinances, and other ancient documents, Surveys, Terriers.
see *Collector of, Composition Real, Impropriator, Lessee of Rectory, Modus.*
TITHING, decree as to, 423.
TITLE,
of honour, claim to, bill to perpetuate testimony as to, 134-5.
Stat. 5 & 6 Vict. c. 69, *ib.*
to an estate, refusal to deliver out depositions *de bene esse*, to perfect, 142 *g.*
Inquiries as to, 490 *a.*
form of Order for, 501.
of Interrogatories, alteration in such, effect of, 67; see *Interrogatories, title of.*
in a Reference as to, an opportunity given of producing evidence to remove an objection, 521 *d.*
" or matter in question;" see *Masters, Affidavits.*
see *Pedigree, Peerage;* Preface, x.
TITLE DEEDS; see *Deeds; Production of Documents.*
TOMB, inscription on, how proved by copy, and why, 149.
TOMBSTONES, inscriptions on, evidence of pedigree matters, 318-19 *a.*
TOMBSTONES—*continued.*
inscription on, effaced, or stone lost, secondary evidence of, 319 *a.*
TONNAGE DUTY, in bill for, use of depositions in former suits for same, 261 *e.*
TOWN; see *Cross-Examination in Exchequer; Witness, Country, brought to.*
TOWN CLERK, commission irregularly executed before, instead of before commissioners, 219 *g.*
TRADE, words relating to a particular, in a written instrument, explainable by parol, 280 *c.*
general usage in, evidence of, use of, to interpret an instrument, 280 *f.*
TRADING, clergyman not bound to admit, 83 *i.*
TRADITION on matters of pedigree, what, persons from, 317 *f*; see *Relations.*
as to pedigree, and evidence in support of such, weight due to, 472 *a*; see *Pedigree; Hearsay.*
TRANSCRIPT of Public General Statutes, enrolled in Chancery, 404 *c*, 411 *a.*
TRANSFER OF PROPERTY ACTS, 173 *f.*
TRANSFER; see *Bank of England, Books, Stock.*
TRANSLATE, person employed to, 119; see *Depositions, Foreigner, Language, Interpreter, Notary.*
TRANSLATION, proof of correctness of, 189 *i.*
of an instrument written in a foreign language, 280 *a.*
TRANSMISSION OF DEPOSITIONS, 110 *e.*
TRAVERSING ORDER, Order as to, 121 *c.*
TREASON, where (at Law) one witness to prove, is insufficient, 5 *b.*
TREASURER; see *Lord Treasurer.*
TREASURY, Clerk of, 159.
TREES; see *Timber.*
TRIAL FOR PERJURY, evidence on, 5 *b.*
TRIAL of an Issue, certain rules of evidence suspended for, 525; see *New Trial.*
at Law, when assertion in an answer met by single testimony, corroborated, 227.
see *Answer read at, Defendant, Discovery; Documents, production of; Order for an Issue.*
postponement of; see *Special Circumstances.*
by certificate; see *Certificate.*
conclusive, 254 *a.*
TRINITY HOUSE, Masters of; see *Admiralty.*
TRUST,
cases of, rules as to evidence relaxed in, 6.
declaration of, an omission of, not rectified by parol evidence, 289 *g.*
even as between son and father, parol evidence to show, inadmissible, 292.
relaxation of rules in cases of, 328 *a.*

TRUST—*continued.*
between the parties; admissions in the answer of one, evidence against the other, 430 *c*; see *Special Cases.*
TRUSTEE,
character of, acquired by notice, 292 *b.*
by purchase on behalf of another, *ib.*
mere, competency of, 356.
a plaintiff, liable for costs, (before the Act) incompetent, 357 *d.*
shall not be a witness to betray his trust, *quære*, 382 *a.*
declaration of, as agent for a party, admissible, 464 *c*; see *Concealed Person, Executor, Administrator in Trust*; *Mere Trustee.*
declaration of *cestuis que trust*, admissible against, 464 *a.*
TRUSTS
imperfectly expressed, or (owing to fraud) secret, parol evidence to declare, 292.
created, though not expressed, parol evidence as to, 292 *b.*
of a Will, suit to execute, 179 *b.*
inquiries in, as to heir, 179 *e.*
TRUTH, temptations to deviation from, 322.
of testimony of witnesses, by whom tried, 325.
TURK, or other Mahometan, witness such, how sworn, 65-6 *f.*
TURPIS CONTRACTUS (being irrelevant), not allowed to be proved, 231 *b.*
evidence of, let in by allegation of "undue means," 233 *f.*
TUSCANY, Great Duke of, prevention by, of the execution of a commission, 252 *a.*

UBI JUDEX DUBITAT; see *Case sent to a Court of Law.*
UNCERTAINLY, a witness speaking, not ground for his being examined again, 203 *e.*
UNCERTAINTY, deed made void for, 279.
UNCLE and Nephew or Niece; see *Relative.*
UNDERWRITERS; see *Lloyd's List.*
UNDUE Advantage, having been taken, *onus probandi*, 390 *a.*
Influence, on the part of her husband, *onus probandi* lies upon the wife, 390 *a.*
Means, allegation that bond had been obtained by, lets in evidence of a *turpis contractus*, 233 *f.*
UNITED STATES OF AMERICA,
affidavit in, 542 *e.*
UNIVERSAL NOTORIETY, what? 395.
UNIVERSITY of Saint Andrews, Scotland, seal of, to be proved, 154 *e.*
book of Acts of, entry in, examined copy of, to prove a degree taken, 154 *e.*
how far public, 170 *f.*
of Colleges and halls in each, *i.*
books of, entries in, as to admissions, 304 *d.*
UNSOUND MIND, person found to be of, validity of deed executed by, issue to try, 524 *a.*
USAGE, to explain an instrument, 281 *a.*
modern, of forty years' duration, of what evidence, 281 *f.*
of Merchants, evidence as to, to explain words and phrases, 280 *f*; see *Local Usage; Tithes, usage as to.*
of Trade; see *Trade.*
USE of Exhibits, after proof thereof, as evidence, optional as advisable, 192 *b.*
UTRECHT, Town and Minister of, certificate of, as to marriage and cohabitation, 439.
VALIDITY of Deeds, form of Issue to try, 524 *a.*
of a Document, withholden by an adversary, need not be proved, 275 *a.*
necessity of proof of, prior to secondary evidence of its contents, 272.
VARIANCE, rules respecting, why of less consequence in Equity, 232 *e.*
rules as to (at Law), 242 *d.*
VENUE, change of, in the trial of an issue, grounds for, 529 *a*; see *Special Circumstances.*
VERBAL inquiries, at the hearing, irregularly made and answered, 500.
VERDICT,
record of, to prove the opinion of the jury, 161 *d.*
not being available for or against a person in another cause, he was always competent, at Law, 348 *e.*
given in evidence in a suit, &c., 359 *c.*
in a former similar action, as to a right, conclusive evidence, 425 *a.*
at Law, use of, in Equity, as evidence, 430-1.
at Law, use of, in a subsequent action at Law, 434 *d.*
in Courts not Courts of Record, 434-5.
on the trial of an issue at law, the Judge in Equity may treat as a mere nullity, 528.
on an Issue; see *Judge.*
VERIFY certain statements, affidavits the means to, 538.
VESTING ORDER, 156 *b*; see *Insolvent Acts.*
VESTRY, evidence of what passed at, to explain an entry of payment, in the parish books, refused, 276 *i.*
VICAR,
right of, to appoint a Curate, 312 *a.*
since deceased,
written statements by, 311 *f.*
books of, entries in, available to his successor, 311 *f.*
entries by, though not in a regular account book, 312 *e.*
use of, in tithe suits, 312 *e.*
proper repositories for, 313 *c*; see *Custody.*
VICARAGE, endowment of, 167 *d.*
VICE CHANCELLOR; see *Judge who directed an Issue.*
VIDIMUS, Order as to the examination of, 411 *b.*

VIRGINIA, witness in, 122 *c*.
VISION, superior powers of, in some men, used in evidence, 267 *b*; see *Sight*.
VISITATION; see *Universities, Books of*.
by heralds; see *Heralds' Books*.
VISITORS, sentences by, 435.
VIVA VOCE
examination, advantages of, 12-13.
examination by the Court, 493, *et seq*.
in Court, *subpœna* to testify, form of, 493 *b*.
examination; see *Contempts, Exhibits*.
examinations, particular instances of, 495-6.
examination, prayed, but refused, in the case of Eustace Budgel, 495-6.
power of Equity Judges to examine, limitation of, 496.
evidence of witnesses being obtainable, no use to be made of their depositions *de bene esse*, 142.
testimony on a former trial, at law, use of, as secondary evidence, 258.
examination of witnesses, by the Master, Order as to, 507.
power of Master to examine any witness, 507 *d*.
examination, evidence upon, how to be taken and preserved, 507 *f*.
power of Master to examine claimants, creditors, and witnesses, 514 *a*.
examination, before the Master, of a creditor or other claimant, 519-20.
witnesses examined, by the Master, on a reference, 507.
examination of witnesses, in the Chancery of Ireland, 53-4 *d*.
examination of witnesses, in the Ecclesiastical Courts, 191 *d*; see *Prerogative Court, Examination by the Court*.
proof of exhibits, 146-7.
proof of a deed, at the hearing, 173 *f*.
proof, by witness, of exhibits, at the hearing, 188, *et seq*.
cross-examination not permitted, 191 *b*.
examination of a witness, in Court, at the hearing, by Order, to prove an exhibit, 194.
in the Ecclesiastical Courts, when allowed, *ib. a*.
VOID, deed made, by uncertainty, 279.
VOIRE DIRE, examination, at Law, on, 328, 329 *b*.
examination, in Equity, in the nature of, 331 *a*.
of a witness, question put on, 347.
VOLUNTARY
AFFIDAVIT, 258 *e*.
not recognised by the Court, 460.
admitted as an admission, 468 *c*.
not recognised, but deprecated, 540 *g*.
DECLARATION, under the stat. 5 & 6 Wm. 4, 540 *h*; see *Statutory*.
VOUCHERS having been impounded, Court allowed items on affidavit of the impoundment, 514 *f*.
VOUCHERS—*continued*.
want of, in taking an account, supplied, under special circumstances, 195.
WAIVER
of a claim to be exempt from testifying, effect of, 81 *a* and *b*.
of an objection, for irregularity,
by cross-examining, 222 *b*.
for incompetency, 369-70.
of a right to have depositions suppressed, for irregularity, 225 *a*.
of an objection, by filing an affidavit in answer, 537 *e*.
by plaintiff being opposed, inquiry directed, 490 *a*.
Master may act upon, 505 *g*.
certifies as to, 505-6.
see *Admissions*.
WALES, incorporation of, with England, 399.
Shires of, Judicial Seals of, 413 *d*.
Courts of Great Sessions in,
Seals of, 413 *d*.
Chancery side of, decree in, 425.
fines and recoveries in, exemplification of, 413 *d*.
WAR, Court takes notice of the existence of, but refers to the Gazette, 400 *b*.
proof of the commencement of, 401 *a*.
WARD OF COURT, inquiries as to, *viva voce* in Judge's private room, 494 *b*.
viva voce information as to, sufficient to induce an order that not to be taken out of the jurisdiction, 494 *b*.
WARRANT,
lost, what sufficient search for, 269 *c*.
to name Commissioners to examine witnesses, not until four days after replication, 95 *d*.
application to Master for, 96 *b*.
to consider the Decree, 502-3 and 505 *c*.
on preparing the Report of the Master, 513.
no further evidence after issuing, 522 *a*.
WASTE of a Manor, rights upon, proof of, 235 *e*.
ownership of, evidence of reputation as to, 306 *a*.
right to dig stones on, evidence of reputation as to, 306 *f*.
WATERCOURSE, rights as to, 474 *d*
WAY, right of, evidence of reputation as to, 305 *e*.
WEAK,
a party being, to be examined under the express care of the Master, 341 *b*, 506 *b*.
WEDDINGS, 167 *f*; see *Marriage, Parish Registers*.
WEST INDIES, Demerara, mortgage of lands, &c. in, rules as to evidence of, 4 *e*.
commissions to examine witnesses in, 116-17 *a*.
proof of death in, by hearsay evidence, 320 *d*.
WESTMINSTER ABBEY; see *Exchequer, receipts of*.

WESTMINSTER SCHOOL, case of, 492 *d.*
WHIPPED, a pauper plaintiff (under certain circumstances) ordered to pay good costs, or be, 151 *a*; see *Suggestions.*
WIDOW; see *Husband and Wife; Wife.*
WIDOWS AND DOWAGERS, of Temporal Peers, privileges of, 65-6 *f.*
WIFE,
legitimacy of, declarations of husband, since deceased, as to, 317 *e.*
misbehaviour or misconduct of, proof of, 233 *d* and *e.*
declarations by, as to money raised by a mortgage out of her estate, 315 *a.*
during former coverture, evidence of, admissible as against present husband, 315 *a.*
testimony of, exclusion of, 342.
of a *prochien ami* incompetent, 342 *f.*
of a bankrupt, examinable, by the Acts, 343-4 *a.*
of an appointee not a credible witness to attest deed executing a power, 173 *a*, 341 *d.*
statements by, evidence of, not admissible in an action by husband, 308 *b, ad finem.*
admissions by, as agent for husband, not within the scope of his implied authority, not receivable, 315 *a.*
admission, confession, or declaration by, 344 *f*, 345.
evidence of, to save the life of her husband, 350 *f.*
see *Access, Bastard, Feme Covert, Husband, Influence.*
WILL,
Decree as to,
effect of, 424 *a*, and see 442 *et seq.*
Decree establishing,
not evidence of the decease of the testator, 424 *e.*
original, production of, by the proper officer, 178 *d.*
lost, established by a copy, 186 *e.*
construction and explanation of;
not holpen (in general) by evidence inferior to, or other, in lieu of, the proper evidence, nor by extrinsic, in aid of it, 276-7 *a.*
construction or explanation of,
admissibility of extrinsic and parol evidence, 282 *e*, 283, *et seq.*
the explanation of one, by a card referred to, 277 *a.*
words of, if intelligible, construed according to meaning, 284-5 *b.*
parol evidence to explain, rules as to, how affected by the Statute of Wills, 297 *b.*
use of a dictionary to show the meaning of words in, 397 *b.*
ambiguities and difficulties in, reference to the work of V. C. Sir James Wigram, as to, 278-9 *a.*
WILL—*continued.*
effect of;
argument that, is a distribution of the testator's property among his children, 477 *c.*
Codicil being distinct from, evidence as to, 444 *a*; see *Ademption, Presumption.*
Sentences of the Ecclesiastical Court as to, 442, *et seq.*
execution of,
since 1837, 182.
recital of, 462 *b.*
signature to, comparison with, to prove handwriting, 267 *b.*
lost, what sufficient search for, 269 *c*; see *Custody.*
in Archdeacon's Court,
destroyed by the fire in 1666, 269 *c.*
of lands, lost, secondary evidence of, 272.
exemplification of, 414 *g.*
and validity as to disposition of realty suspected, 414 *g*; see *Exemplification.*
as to a particular estate, parol evidence to show that an instrument is not, 278 *b.*
Alteration, Interlineation, or Obliteration in, 452 *d.*
presumption, as to revocation of, passed into a rule of law; rule enunciated, 302.
see *Publication, Revocation.*
before 1838, presumed void, in consequence of subsequent marriage and the birth of a child, parol evidence as to, 300, *et seq.*
since 1837, not revoked by any presumption on the ground of alteration of circumstances, 300 *e.*
but, of man or woman (except certain, made under powers), revoked by marriage, 300 *e.*
revival of, parol evidence as to,
in the Ecclesiastical Courts and in the Courts of Equity, 278 *b.*
rejected by the Ecclesiastical Courts, 297 *a.*
production and proof of,
as evidence, 178, *et seq.*
of lands, 179, *et seq.*
never allowed to be proved by the examination of witnesses, *viva voce* in Court, and therefore still less by affidavits, 180 *b.*
evidence as to authenticity and genuineness of, 186 *f*; see *Custody, Forgery, Fraud, Handwriting, Spelling.*
not proveable at the hearing, as an exhibit, 189 *f.*
to prove, leave given at the hearing,
where omissions of proof had been only through the slip of counsel, 197 *e*, 199 *k.*
in the Exchequer, leave given to examine further witnesses, 199 *g.*
of lands, 179, *et seq.*
suit to establish, against the heir-at-law, 179.

WILL—*continued.*
as to the heir-at-law being made a party, 179 *b*.
case for an Inquiry and an Issue as to, 491 *b*.
the heir-at-law questioning, an Issue granted, 523 *b*; see *Attesting Witness, Heir-at-Law, Inquiries, Issue, Sanity.*
distinction between proving for certain purposes only, and establishing, 179-181.
not proveable as an exhibit in Court *viva voce*, or by affidavit, 180 *b*, 493 *c*; see *Sanity.*
never proved before the Master, for the purpose of establishing it, 182 *b*.
probate copy of, is copy of the original minutes of the Ecclesiastical Court, drawn up in a more formal manner, 414.
of personalty, in proof of, seal of the Ecclesiastical Court, 414 *a*.
for proof of, in the Ecclesiastical Court, similitude of handwriting, 267 *b*.
taken abroad, to be proved, 115 *c*.
of property abroad, proved here, *ib*.
or testamentary instrument of appointment, by a *feme covert*, proof of, *per testes*, and not in the Ecclesiastical Courts, 178 *e*.
not proveable by proof of handwriting of a witness, unless his death proved, 261 *d*.
attesting witness of, abroad, dead, incompetent, or interested, 363 *e*.
abroad, practice as to proving, 265 *a*.
objection to, that the witnesses have not all been examined, 228 *c*.
witnesses to, admitted to impeach, 386 *a*.
remarkable instance of perjury of, 386 *a*.
(under old Act) attesting witness being son of a residuary legatee, 349-50 *a*.
the attorney who drew, being one of the residuary devisees, 474 *e*.
ejectment to set aside, for fraud and imposition, 234 *d*.
of a person still alive, forgery of, 442 *c*.
forgery of probate of, 443.
probate of, forgery of, *ib*.
ancient, use of, in evidence; possession going along with it, 185-6 *a*.
codicil, &c., declarations in, 282 *c*, *ad finem*.
in pedigree cases, 316 *g*.
statements and description in, use of, in proof of relationship, 319 *f*.
WILLS, Act for the amendment of the laws with respect to, 182, *et seq.*
Act of Parliament regulating, viz., stat. 7 Wm. 4, and 1 Vict. c. 26, not repealed by the stat. 6 & 7 Vict. c. 85, for improving the Law of Evidence, 327 *c*, 350 *a*.
writing generally necessary as evidence of, 276.
notes on, in this Edition, why limited, 182 *e*, reference to some, by Mr. Tamlyn, in his work on Evidence, *ib*.
see *Destruction, Forgery, Fraud, In Odium Spoliatoris; Portion, ademption of; Prerogative Court; Probate; Satisfaction by; Testator; Trusts; Witness.*
WITHHOLDING an original document by a party, effect of, as to letting in the use of secondary evidence, 273.
of a document by a witness, letting in secondary evidence, 275 *c*.
WITHDRAWAL of evidence, by the other party, effect of, 273-4.
"WITHOUT PREJUDICE," at law or in equity, bill dismissed by the Court of Exchequer, effect, 190 *b*.
admissions made, 459 *c*, 466 *b*.
a letter expressed to be, effect of these words to prevent the use of the reply also, 47 *a*.
not readable in evidence at law, 187 *c*.
sweeping effect of the use of the words, in one letter of a correspondence, 466.
WITNESS,
mere, not to be made a defendant, 14 *c*.
being improperly made a defendant, should plead, not demur, 14 *c*.
preliminary information as to, 470; see *Credibility, Credit, Scientific, Solicitor.*
inquiry of, by party or solicitor, what not improper, what proper, 221 *i*.
(formerly) produced at the seat of the Clerk in Court, 65 *a*.
a note of name, &c., 65 *b* and *c*.
why to be shewn to the other side, 469.
why note of name and abode of, to be delivered to the other side, 469 *h*.
Order to distinguish, before examination, 56 *c*.
refreshing his memory by notes, 73 *b*.
not to read from a paper prepared for him, 220 *h*.
statements prepared for, irregularity of, 220 *h*.
having been furnished with a copy of the interrogatories, 221 *i*.
at Law, remaining in Court after an order to leave, 220 *d*.
one after another examinable, to prove a fact, without impertinence, 238 *b*.
directed to attend (the Court) personally, where they have had a doubt, 495 *c*.
never allowed to be examined at large, at the hearing, 496.
abroad, Commission to examine, 112.
sick, or in prison, Commission to examine, 89 *a*.
dangerously ill, old, or infirm, likely to die, or about to go abroad, 121; see *De bene esse.*
not expected to be well enough to attend a trial at law, 143 *c*.
aged, dead, impotent, or absent, examination *in perpetuam rei memoriam*, 133.
aged, but just discovered, liberty to examine after the proper time, 203 *e*.
abroad; see *Abroad.*
in Scotland, 122 *d*, 126*-7*; see *Scotland.*
in Ireland, *ib.*; and see *Ireland.*
absence of, sufficient evidence of, to let in the use of his depositions, taken on interrogatories, at law, 143 *c*.
see *Best Witness, Secondary Evidence.*

WITNESS—*continued.*
death or incapacity of, to let in inferior evidence, 249.
dying before being re-examined, his prior examination used, although irregularly taken, 225 *a*; see *Depositions.*
dead, as to his depositions taken *de bene esse*, Common Order to publish, 14.
not be found, 252.
being a Foreigner, how to be examined, 68 *c.*
being an Atheist cannot be examined, 65-6 *f.*
swearing of, (formerly) before a Master, 65. (but now) by the Examiner, *ib. d.*
not being a Christian, certificate of how sworn, 109 *a.*
being of another Religion; see *Religion of Witnesses.*
a Jew, Turk, Infidel, Heretic, or of any other denomination, how sworn, 65-6. or affirmation taken, *ib.*
to testify *vivâ voce* at the hearing, 191; see *Conduct Money, Expenses, Service, Subpœna, Tender of Expenses.*
being in an enemy's country, proof of his handwriting, 265 *a.*
parties at liberty to examine each other as, on trial of an issue, 525 *f.*
living, and can be produced, his depositions cannot be read at law, although he has become interested, 366 *e.*
when a person has a disqualifying interest, rule stated, 351; see *Incompetency.*
interested, evidence of, given whilst disinterested, 366.
becoming interested, his hand proved, 366.
but as to his depositions, *qu., ib.*
persons, classes of, precluded from being, 377; see *Privilege.*
being interested, or *in pari casu*, an objection to credibility, not to competency, 346, *et seq.*
single, credit given to the, testimony of, 4 *b.* when corroboration required, 4.
the (unsupported) testimony of, insufficient, against a distinct and positive assertion in the answer, 227 *e*, 421, *et seq.*
credit of, 325; see *Credibility, Credit.*
having sworn contrary to former depositions, 112 *e.*
examination to impeach credit of, 204, *et seq.*
character and credit of, how inquired into and impeached, in the Ecclesiastical Courts, 204 *c.*
statements by, on other occasions, 204 *d.*
asked "whether he would believe such an one (another witness) on oath?" but not the reason of such opinion, 207.
asserting that to be false, which by his solemn act he has attested to be true, to be heard with jealousy, 386 *c.*
not to be entrapped into a false oath, 388 *a.*
to handwriting, must swear to his belief, 265; see *Handwriting.*
saying, he *thinks* it the handwriting of A. B. is no proof, 265 *b.*

WITNESS—*continued.*
reputation of, influence of, not ground for a change of venue, 529 *a.*
unto deeds, by the laws of France and Germany, noble and free, 175 *a.*
attempt to mark and particularize, 469; see *Scientific Witnesses.*
credit due to, 469.
as to capacity, mere opinion of, in the Ecclesiastical Court, has little weight, 233 *b.*
scientific value of, 470 *a.*
the circumstances as to, affecting the credit due to each, 471-2, *et notis.*
credit due to, being the question, an Issue directed, 527 *d.*
credit due to, remarks of C. B. Gilbert as to, 471-2.
to be heard, credit to be examined, 386 *b.*
evidence by, 52, *et seq.*, and see *Affidavit.*
how examined according to the Civil and Canon Laws, 52 *a.*
examination of, precluding amendment of bill, 28.
to prove exhibits by affidavit, 147.
ancient mode of examining, in the Chancery, and the Exchequer, 52 *d* and *e.*
how examined in the English Civil and Canon Law Courts, so called, 52 *e.*
in Chancery; time allowed to examine, 521 *c.*
examination of, 61.
attendance of, appointment for, 64.
to be examined, how enforced, if necessary, 64 *a.*
incapable of travelling, Examiner may attend, 67 *a.*
should not disclose the evidence to the parties, 71 *c.*
not bound to answer, whereby to admit a criminal act, 81—83, *et seq.*
not bound to answer, whereby to subject himself to a forfeiture, 84.
is bound to answer, although it may establish his liability for a debt, or to a civil action, 84 *e.*
is bound to answer, although it may affect his civil rights, 84 *e.*
not bound to answer whereby to admit disgraceful conduct, 85.
may be bound not to answer, to injure the reputation of others, 86 *a.*
cannot object to disclose the most confidential (unprivileged) communications, 381, 382.
may venture on the punishment that will ensue on his refusing to give testimony, 382 *a.*
how far he should "conceal or suppress that which the justice of his country calls upon him to reveal," left to his own conscience, 382 *a.*
required to testify before Commissioner, disobeying summon, 101 *c*; see *Summons.*
disobeying *subpœna*, 101-2; see *Subpœna.*
making default, liability to an action at law, 102 *c.*
not attending, Action at Law against, 461 *b.*

WITNESS—*continued.*
required to testify before a commissioner, when and how *subpœna* must be served, 101.
his attendance before commissioner (new practice), secured by summons, 101 *b.*
conduct money, and tender of his expenses, 101 *c.*
required to depose to his opinion on a matter of skill, remuneration to such an one, 101 *c.*
mode of examination of, by examiner, 64, *et seq.*
examined by the examiner separate and in secret, 67 *c.*
to be examined on interrogatories exhibited before he was sworn, 65 *c.*
under examination by examiner, how to "conform" himself, 68 *a.*
examined secretly, effect, 74.
mode of examination of, under a commission, 104-5.
how to be introduced to commissioner; how oath to be administered, 104.
a commissioner, or his clerk, being such, how to be examined, 107 *b.*
depositions of, before a commissioner, heading of each, 103 *c.*
depositions of, to be in the first person, 74 *a.*
his signature to depositions, essential to their utility, 106 *d.*
examined by a commissioner, to sign the engrossment of his depositions, 110 *c.*
examination of, system of, (in Chancery) disadvantages of, 469.
attendance of, for cross-examination, 71.
having been examined, must be produced to be cross-examined, or his depositions will be unavailable, 71 *b.*
after examination, kept in town for cross-examination, 71 *b.*
cross-examination of, by a commissioner, 106 *c.*
secreted before cross-examination, 221 *b.*
country, brought up to town, and cross-examined, 223 *b.*
kept in town to be cross-examined, practice in the Exchequer, 223 *c.*
mistakes of, rectified, 106 *a.*
omission of, rectified, *ib. b* and *c.*
errors of, cases of defects supplied, 197-8-9.
refusing to be examined by commissioners abroad, 251.
irregularity in examination of, instances of, 219, *et seq.*
to be examined *in perpetuam rei memoriam*, 142.
examination of, after publication passed, 140, 141 *a.*
examined under a commission executed in Scotland or Ireland, conduct money, expenses, privilege, attendance, 127 *a.*
cannot be re-examined on the same interrogatories, or to the same matter, without order, 69-70.

WITNESS—*continued.*
may (before publication) be examined again, upon any interrogatory already filed, or upon new ones, not to the same points, 70.
when may be re-examined
"by consent or special order," 70 *a.*
examination of, after publication; instances of, (old cases), 203 *e.*
re-examination of, before the Master, by Order, 507, *et notis.*
to be re-examined, interrogatories to be settled by the Master, 519 *a* and *b.*
examined by commission, re-examination suppressed, 105 *d.*
not re-examined after publication, 106 *a.*
having been examined and his evidence suppressed, 375.
motions to re-examine, on the ground of accident or surprise, 199, 200.
examined again, circumstances having been brought to his memory, 202 *c.*
rules for the examination of, departure from, ground to suppress the depositions, 219.
examination of, on a reference, 502.
examined in the cause may be again examined on a reference, 507.
having been examined *vivâ voce*, affidavit by cannot afterwards be read, 512 *c.*
re-examined, (by order) after suppression of depositions, to be cross-examined as well as examined in chief, 203 *f.*
whose depositions have been suppressed for irregularity, being re-examined, all such must be re-examined and cross-examined, 225 *a.*
whose depositions suppressed for irregularity may still be re-examined but must be also re-cross-examined, 225 *a.*
re-examination of, before the Master, a new order is necessary and why, 518.
attesting, refreshing memory of, 174 *a.*
to deeds, 173 *f.*
to an instrument purporting to execute a power, 174 *a.*
attesting an instrument (not being a will), one only need be examined, 176.
attesting, to an instrument, alleged to be dead, handwriting not provable *vivâ voce* at the hearing, 189 *e.*
to a Will,
one examined would prove it at Law, 180.
but every one must be examined in Equity, *ib.*
to a will having become insane, proof of his handwriting admitted, 181 *a.*
more than one to a will, since 1837, 182.
how to attest and subscribe, 182-3.
to a will since 1837, incompetency of, not to invalidate, 183.
attesting, to a will, since 1837, gifts to such void, 183.
subscribing, dying declaration of, by way of confession of forgery, evidence of, 315-6.

WITNESS—*continued.*
dying before his examination completed, it is useless, 223 *c.*
but not if only before cross-examination, *ib.*
dying before cross-examination,
yet his depositions in chief available, 257 *a.*
name of, in affidavit on a motion for a commission to examine witnesses abroad, 113.
material, to examine, affidavit as to, 545 *d*;
not having had an opportunity of inspecting documents, 200 *c.*
demurring to an interrogatory, 77, *et seq.*
must state his objections very carefully, 79 *a.*
his right to demur again, if beaten on a point of form, 87 *h.*
objecting to answer, on grounds of public policy, 66.
a member of Parliament, not bound to close the proceedings, 86 *d.*
certificate of commissioner,
as to the misbehaviour of, 108 *d.*
demurrer of, to interrogatories, 108 *e.*
refusal to produce documents by, 108 *e.*
who detains a document, or disobeys the *subpœna duces tecum*, punishment of, 275 *c.*
aged and infirm; see *Memory.*
in East Indies; see *India.*
London; see *Examiner, Examiner's Clerk.*
Country; see *Commission.*
see *Atheist, Attesting Witness, Blind, Competency of, general; Competency of, restore; De bene esse; Interrogatories, examination on, at law; Defendant, a Witness, Dead, Deaf, Dumb; Examination of, private; Examination of, vivâ voce; Incapacity, Incompetency, Idiot, Inability of, Incapacity of, Infirmity of, Age of, 67 a; Insane, Lunatic, Medical Men, Partition, Professional Men; Release to, offer of; Single, Sick, Testimony, Will.*
WOMAN, evidence of, to her own advantage *viz.*, to have a husband, 350 *f*; see *Feme Covert, Husband and Wife, Sex, Wife.*
WORDS spoken or written, not always mere hearsay, 304 *b.*
meaning of, reference to dictionaries to ascertain, 397 *b.*
WRECK, right of the Lord of the Manor to, evidence of reputation as to, rejected, 307 *d.*
WRIT OF SUMMONS of a Peer, presumption of, 484 *d.*
WRITS and Orders in the nature of Injunctions, 545 *d.*
WRITING,
for some purposes, by Statute, made necessary, as evidence, 276.
use of a portion of, gives credit to the whole, 466 *c.*
exhibits, proof of, 146, and Appendix.
proof of, 186-7.
see *Acknowledgment in Writing; Depositions to be legible, Documents; Documents, production of; Handwriting; Marks; Marksman; Signature; Stamps.*
WRITTEN
AGREEMENT, by the rule of law, independent of the statute, parol evidence cannot be admitted to contradict, 290.
parol evidence offered by plaintiff, in a suit for a specific performance, to falsify and supersede, refused, 291; see *Agreement, Parol, Specific Performance.*
DECLARATIONS; see *Declarations.*
DOCUMENT, if legible and intelligible, construed according to the meaning of the words, 284-5.
ENTRIES; see *Entries.*
EVIDENCE of admission of facts; see *Admissions; Facts; Issue, putting in.*
INSTRUMENT, referring to another, parol evidence to prove what other, 287 *a.*
extrinsic evidence available to explain, though not to control the language, to aid, though not to vary, the construction, 287 *a.*
variation of, and addition to, by the Court, 289, *et seq.*
admissions as to contents of, by parol, 456 *c.*
for confirmation of, statutory declarations, 460-1.
pedigree, use of, in evidence, 318 *c.*
purporting to be thirty years old taken to have been made at the time when purporting to have been dated, 319 *c.*
made with one object may be inadmissible for another, 319 *c.*
should come out of proper custody, as the family papers, 319 *c*; see *Custody.*
hung up in the family mansion good evidence, and why, 319 *c*; see *Pedigree.*
STATEMENTS; see *Declarations, Entries, Statements.*
WRONG, not to be presumed, 480.
WRONG DOER; see *Spoliation*, 6 *a.*
WRONG-DOING of a defendant, entitling plaintiff to examine witnesses *de bene esse*, 121 *c.*
YEAR BOOKS, Coke upon Littleton almost a digest of, 404 *a.*
YORK; see *Council of, Court of.*
YORKSHIRE, Registry Acts for, 157 *a*; see *Statute.*

THE END.

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